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CASE NO. 80-2218

IN THE
SUPREME COURT OF THE UNITED STATES
1980-81 TERM

WILLIAM R. COLE,

PETITIONER-PLAINTIFF

VS.

HENRY B. GRAY, III, FRANCIS J. CUMMINGS, FRED R. JONES and ALVIN HOLMES, EACH INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITY,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION OF WILLIAM R. COLE FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is summary judgment improper where motive, intent, or subjective feelings must be determined either to establish the existence of a conspiracy to deprive one of constitutional rights or to establish a subjective good faith qualified immunity defense?

2. Does legislative immunity protect a state legislator from liability for actions taken outside the sphere of legitimate legislative activity, even though he may be engaging in legislatively related activity when he takes the action?

3. Does Paul v. Davis prohibit recovery of damages for defamation under 42 U.S.C § 1983 when the defamatory remarks constitute a continuing assault on a property interest?

4. May a plaintiff alleging a deprivation of constitutional rights be denied full access to federal courts simply because he has utilized available administrative remedies and partially regained lost rights?

5. Does the FIRST AMENDMENT guarantee the right to advocate a strong military defense and to work toward that end, and is punishment of the exercise of that right violative of the amendment's proscription?

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding in the United States Court of Appeals for the Fifth Circuit were as follows:

William R. Cole, plaintiff-appellee-cross-appellant; Fred R. Jones, defendant-appellant-cross-appellee; Alvin Holmes, defendant-appellant-cross-appellee; Henry B. Gray, III, defendant-appellee and Francis J. Cummings, defendant-appellee.

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REFERENCE TO REPORT OF OPINIONS

The opinion of the United States District Court for the Middle District of Alabama was unreported.

The United States Court of Appeals for the Fifth Circuit affirmed in part, and reversed in part the decision of the district court and the opinion of the Fifth Circuit is reported at 638 F.2d 804 (5th Cir. 1981).

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 2, 1981. The petitioner timely filed a Petition for Rehearing and a Petition Containing Suggestion of En Banc Rehearing on March 16, 1981. Both the Petition for Rehearing and the Petition for Rehearing En Banc were denied on March 31, 1981.

The jurisdiction of this Honorable Court is posited on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

(Pursuant to Rule 21.1(f) of the Rules of the Supreme Court of the United States, the pertinent text of the constitutional provisions, statutes and regulations cited below is set forth in the Appendix hereto.)

UNITED STATES CONSTITUTION, FIRST AMENDMENT

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

42 U.S.C. §1983

42 U.S.C. §1985(3)

ARMY REGULATION 20-1, 25 OCTOBER 1974, CHAPTER 4, ¶4-2

DEPARTMENT OF THE ARMY TECHNICAL BULLETIN, TB-IG4, INSPECTOR GENERAL GUIDANCE MATERIAL, AUGUST 1967, §1, ¶¶14, 15; §V, ¶41(b).

STATEMENT OF THE CASE

This action for damages under 42 U.S.C. §§ 1983 and 1985 was brought in the United States District Court for the Middle District of Alabama, alleging violation of the plaintiff's rights secured to him under the FIRST, FIFTH, and FOURTEENTH AMENDMENTS to the United States Constitution. The plaintiff asserted[1] that the defendants, Henry B. Gray, III (then-Adjutant General of the State of Alabama), and Frances J. Cummings (a Major in the United States Army, acting as an officer for the Inspector General for the First United States Army), along with two defendants who were members of the Alabama legislature, Senator Fred R. Jones and Representative Alvin Holmes, acted individually and collectively (1) to deprive the plaintiff of his property rights in his non-probationary merit system

1. See Amended Complaint, Record 104.

position and his federal commission in the National Guard; (2) to deprive the plaintiff of his liberty interest in his good name; and (3) to punish the plaintiff for the exercise of rights secured to him under the FIRST AMENDMENT to the Constitution of the United States. The complaint sought compensatory damages for defamation and lost income, expenses incurred in protecting his rights, and for mental pain and anguish, as well as punitive damages.

Each of the four defendants filed motions for summary judgment.[2] The trial court entered an order granting summary judgment in favor of the defendants Gray and Cummings (sometimes herein referred to as the "executive defendants") upon grounds that, as a matter of law, they acted in good faith and had sustained their qualified immunity defenses.[3] In that same order, the trial court denied the motions for summary judgment

2. Record 24, 73, 125, 143, 269, 280, 319, 325.

3. See Appendix, pp. A25, A26.

filed by the defendant legislators Jones and Holmes (sometimes referred to as the "legislative defendants"). However, in so doing, the court ruled that, as a matter of law, the legislators were immune from liability for all those actions taken and statements made by them prior to the termination of a legislative committee's investigation of the Alabama National Guard.[4]

The Fifth Circuit Court of Appeals granted the parties' petitions for interlocutory appeals, and the plaintiff cross-appealed as to the legislative defendants, asserting that the court's immunization as to them was overbroad, since some of the actions of and statements by those legislators, although occurring during the course of the legislative investigation, were still not within the sphere of legitimate legislative activity.

The Fifth Circuit Court of Appeals affirmed the granting of summary judgments in

4. See Appendix, p. A22.

favor of the executive defendants, holding that there was no genuine issue of material fact as to whether they acted in good faith.[5] The Appeals Court reversed the trial court's denial of summary judgments sought by the legislative defendants. The appellate court agreed with the trial court that all the actions of the legislators taken during the pendency of the legislative committee were protected by legislative immunity.[6] The Fifth Circuit also held that the statements made by legislators defaming the plaintiff gave rise to no § 1983 cause of action under Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed 2d 405 (1976). Insofar as the legislators were alleged to have conspired with Gray to deprive the plaintiff of his property right in his job, the Court of Appeals observed that the plaintiff "has shown minimal contact between the executive and leg-

5. See Appendix, p. A48.

6. See Appendix, pp. 47-48.

islative defendants, with no butressing proof of the actual nature of the information conveyed."[7]

In order to permit this Court to assess the facts in this case as they relate to the law, it is necessary to review the evidence which was in the record supporting the plaintiff's case.

The plaintiff, William R. Cole, a federally-recognized Colonel in the Alabama Army National Guard, had served as Military Executive Officer in the Alabama Military Department for 14 years.[8] He was serving in that position in 1971 when the nation's decision to end the compulsory military draft created a serious problem for the military defense of our country. In that year, it suddenly became necessary for active military units, reserve units, and national guard units to aggres-

7. See Appendix, pp. A56-A57.

8. See Record, Plaintiff's Affidavit of June 30, 1978, at p. 1 (in separate binder).

sively seek to attract, secure, and retain necessary personnel to insure the nation's defense.[9]

The Alabama Army National Guard responded to this call in a most remarkable way. Its senior officers, including the plaintiff, put forth significant and successful efforts to insure that the Alabama guard would more than carry its share of the nation's responsibility to prepare for its defense.[10] Colonel Cole worked long hours in the evenings, on weekends, holidays, and at times when he was on annual leave to develop and implement an adequate recruiting and retention program.[11] He and other Alabama guard officers were paid for this overtime work from federal recruiting and retention funds.[12] The results of the work of the plaintiff and

9. Id., at p. 4.

10. Id., at pp. 5-6.

11. Record, pp. 661-662.

12. See Appendix, pp. A35-A36.

others were explosive. Alabama was recognized as the "guiding star" of all the states in the union in its recruiting program, and plaudits for the efforts of Colonel Cole and other senior members of the Alabama Army National Guard were legion.[13] The plaintiff's record of performance in this effort was rated outstanding in every way.[14]

At this point, Senator Jones made an abortive effort to secure for himself a promotion to brigadier general in the guard, and he blamed the denial of that promotion on the plaintiff and other Alabama guard officials.[15] As a result, Jones threatened the plaintiff with retribution.[16] Jones and Representative Holmes then spearheaded a legislative committee investigation into the

13. See Record, Plaintiff's Affidavit, June 30, 1978, at p. 6 (in separate binder).

14. Record, p. 432.

15. See Appendix, p. A42.

16. See Appendix, p. A42.

guard's activities.[17] During the investigation, Holmes and Jones discovered that the plaintiff and other high-ranking officers had been paid for a substantial number of extra duty days.[18] During the hearings, Jones stated that the extra duty payments were "squandered" funds, and "Holmes asserted that Cole did not work on all the days for which he received pay."[19] As this controversy was in progress, then-Adjutant General Rollo requested the Commanding General of the First United States Army to conduct an investigation, and the defendant Cummings was sent to Alabama to "conduct an official inquiry to determine the propriety of utilization of recruiting and retention funds by officials of

17. See Appendix, p. A36.

18. See Appendix, p. A37.

19. See Appendix, p. A37. During this time, the plaintiff testified that Jones told him confidentially that, if Cole did not "change sides," that "they" could get Cole's job. Record, Plaintiff's Affidavit, August 7, 1978, at p. 18.

the Alabama National Guard."[20]

Cummings' authority as an Inspector General investigator afforded him little or no discretion, since his responsibility was only to "thoroughly investigate the facts bearing upon a given situation and make an accurate, complete, and impartial report" without "even a semblance of injustice."[21]

Shortly after Cummings' arrival in Alabama in March of 1976, he met with Jones, Holmes and other members of the legislative

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20. See Appendix, p. A38; Record, 513.

21. See Appendix, pp. A68-A69; Record, 537. Cummings was obviously not impartial from the outset. While the plaintiff and his associates were struggling diligently to recruit more members for the guard, partially by advertising potential economic benefits of guard units to local communities, Cummings' attitude was that Alabama already had too many people in the National Guard and that there was something wrong about using potential economic benefits to encourage recruiting and retention. See Appendix, p. A43; Record, Cummings' Deposition, Vol. I, pp. 116-139; Record 471. Cummings' duty to "impartially" investigate the "propriety" of utilization of the recruiting funds was therefore a responsibility that he intentionally refused to accept, because he was not concerned with how much work was done by the plaintiff nor with the results of such work. See Cummings' Deposition, Vol. II, p. 107; Record, 471.

committee.[22] Cummings was aware of Jones' motive in wanting Cummings to uncover guard wrongdoings,[23] yet he listened to Jones and the other members of the committee, and had other subsequent discussions with Jones, and said he "would presume" that the plaintiff was mentioned in these conversations.[24]

The record clearly shows that Cummings accepted suggestions of Jones and reached a conclusion thereon in favor of Jones' position approximately two days later.[25] The contacts by the legislators with Cummings were admitted to be simply contacts "with another government agency," and Jones has admitted that the committee was "not interrogating or investigating" when it made such contacts and that "we did not look upon Major Cummings as a

22. See Appendix, pp. A38.

23. Record, Cummings Deposition, Vol. I, pp. 67-68, 73-74.

24. Record, Cummings Deposition, Vol. I, p. 75.

25. Record, 516-531.

witness."[26]

The legislative committee was dissolved on June 3, 1976,[27] and Cummings' report was filed on September 14, 1976.[28]

The Court of Appeals' opinion recites that Cummings' report of inquiry "levelled two basic charges against Cole: (1) that he excessively used man-days, receiving pay for work that was apparently not necessary, and (2) that he participated in defrauding the federal government out of hundreds of thousands of dollars annually in the method of issuing orders in the Alabama military department."[29] Cummings has admitted, however,

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26. Record, Jones Deposition, pp. 91-92.

27. Record, 478-479, 510.

28. See Appendix, p. A38.

29. See Appendix, pp. A38-A39. While these are accurate summaries of the charges, Cummings also reported that the plaintiff had "grossly abused the public trust and confidence" (Record, ROI pp. 15-16), that his motive was "personal avarice" (Record, ROI p. 6), and "greening [his] pockets" (Record, ROI p. 9), that he had engaged in conduct "intended to deceive" (Record, ROI p. 9), and that he was guilty of "vehement abdic[a]tion of responsibility." (Record, ROI pp. 5-9).

that at the time he wrote the report he had no facts to show that Alabama could have achieved the same results by spending less money.[30] As to the method of issuing orders, he knew that Alabama military regulations permitted the method used, and did not bother to determine that the federal National Guard Bureau had approved those regulations, saying that fact would have "made no difference."[31] A series of independent investigations into these allegations have all resulted in findings of no fraud and no wasting of federal funds.[32]

30. Record, 429; Cummings Deposition, Vol. III, p. 116.

31. Record, 434-435; Cummings Deposition, Vol. I, pp. 87-89.

32. A board of military officers examining a related case found that "there is no evidence to support a finding that large sums of federal money have been wasted" (R. 433, 474), and an independent hearing officer in another related case observed that "[n]o place in either of the Reports of Investigation or any of the testimony is there evidence to support any fraud." (Record, Exhibit 8 to Plaintiff's Affidavit of June 30, 1978, in separate binder). (Emphasis added).

Gray was sworn in as Adjutant General on March 25, 1977, and met with Jones at a luncheon meeting on the day before, March 24th.[33] The Court of Appeals has called Gray's attendance at this meeting "[t]he only allegation bearing the slightest potential damage to Gray's claim of good faith," and asserts that the plaintiff only speculates that he "must have been the subject of that conversation."[34] Although such speculation was perfectly logical, the remaining evidence in the record clearly demonstrates that Cole was in fact discussed on that occasion by Gray and Jones.[35] Also, Gray has testi-

33. Record, Gray Deposition, pp. 4-5, 41. This is the same luncheon meeting erroneously referred to in the Court of Appeals' decision as being April 24th. See Appendix, p. A49.

34. See Appendix, pp. A48-A49.

35. Jones only said "Colonel Cole's name could have possibly come up in the R. and R." on that occasion (Record, Jones Deposition, p. 61), but Gray specifically admitted that he told Jones on that occasion that he was considering suspending Cole from his job. Record, Gray's Deposition, pp. 44-45.

fied that Jones frequently came to his office and discussed the status of the adverse actions against Cole and the other officers,[36] and said that "[Jones] knew about as much about what was going on as I did."[37] Jones, however, denied having any conversation with Gray about the disciplinary action against Cole.[38]

Gray first suspended Cole from his merit system position, and then discharged him by letter dated April 20, 1977. The letter charged Cole with "gross abuse of the public trust and confidence," and observed that the allegations against Cole on pages 5-9 and 15-19 of the Report of Inquiry were fully supported by the evidence, that Cole had been guilty of conduct "in violation of [his] oath of office," that he had made or caused to be

36. Record, Gray Deposition, pp. 177-179.

37. Record, Gray Deposition, pp. 198-199.

38. Record, Jones Deposition, p. 63.

made "false or misleading statements to investigative officers and employees of the United States," that he had committed certain crimes in that he "knowingly and wilfully manipulated, misrepresented, falsified, or concealed material facts in connection with official documents," and finally, that he had acted in a manner contrary to his trust and "subversive of constitutional government."[39]

When Gray made these charges, he did not know of any law which Cole had violated, nor had he ever determined whether any of the charges in Cummings' report were correct.[40]

The Alabama personnel board convened to hear Gray's charges against Cole on June 30, 1977, when Gray's attorneys presented his case against Cole. The hearing was not completed on that day, but was continued until July 7, 1977, when Cole presented his case in rebut-

39. Record, 547-548.

40. Record, Gray Deposition, pp. 72-73, 83, 86.

tal.[41] On that date, even though Gray still had not investigated the evidence and had no knowledge of any evidence of fraud or illegal conduct on the part of Cole,[42] he wrote a letter to First United States Army, essentially repeating the same charges he had made in Cole's letter of dismissal, and asking that Cole's federal recognition as a Colonel in the National Guard be withdrawn.[43]

The charges in the dismissal letter were found not to be supported by the evidence at the personnel board hearing, and the board entered an order on July 28, 1977, reinstating Cole but denying him 33 days of back pay.[44] At or about the same period of time, independent hearing officers heard evidence in five related cases and all recom-

41. Record, Personnel Board Transcript, Exhibit 5 to Gray's verified Answer.

42. Record, Gray Deposition, pp. 85-86, 169.

43. Record, Gray Deposition, pp. 137-139.

44. See Appendix, p. A40; Record, 491-494.

mended reinstatement of the officers involved, but Gray, without knowing what evidence was before those officers, did not agree with their decisions and persisted in his efforts to further punish those officers.[45] When Governor Wallace directed Gray to reinstate three other officers and to seek cancellation of Gray's request that the federal recognition of those officers be withdrawn, Gray reluctantly complied.[46] He thought Cole should receive an additional suspension, however, and did not seek to cancel his request that Cole's federal recognition be withdrawn.[47]

During this time, the defendant Holmes telephoned Gray to inquire about the federal recognition settlements, and Gray told him that the governor had ordered him to seek can-

45. Record, Gray Deposition, pp. 201-210.

46. Record, Gray Deposition, pp. 193-198.

47. Record, Gray Deposition, pp. 195-196.

cellation of those requests.[48] Holmes then made a public statement that Cole and the other officers were "corrupt," were "criminals" and implied that they should be "behind bars."[49] Previously, at a public press conference, Holmes was quoted as saying he was opposed to the personnel board's decision to reinstate Cole, and called Cole the "most notorious racist out there."[50] After Cole's reinstatement, Gray had publicly stated that the occasion was "a sad day for honesty and integrity in government" and reduced Cole's responsibilities upon his reinstatement from those of a division chief to a branch chief within the division.[51]

Tne First United States Army did not cancel the hearings of the other officers upon

48. Record, Alvin Holmes Deposition, p. 54.

49. See Appendix, p. A46.

50. See Appendix, pp. A40-A41.

51. See Appendix, p. A40.

Gray's request, but instead went forward with its scheduled hearing on one of them, Major Hathorn. An independent Army Hearing Board found the evidence against Hathorn to be insufficient to sustain the charges against him, and subsequently First Army, sua sponte, cancelled all those proceedings, including the one against Cole.[52] During the Hathorn hearings, Jones made a public statement to the effect that "[t]he people out there that's on trial [implying Cole, who faced similar proceedings] are the ones that's done something wrong," and stated that those people "have been caught with their hands in the cookie jar."[53]

Just after the Hathorn hearings were concluded exonerating Hathorn, Holmes made a public statement saying: "The guy is guilty. Everybody who looks at the inspector general's

52. Record, 499-500, 561-563.

53. Record, 487-488.

report knows he is guilty. He should be punished."[54] Holmes, however, had never even seen the inspector general's report.[55]

54. Record, 544.

55. Record, 488; Alvin Holmes Deposition, p. 4.

ARGUMENT

1. Summary Judgment is improper where motive, intent, or subjective feelings must be determined either to establish the existence of a conspiracy to deprive one of constitutional rights or to establish a subjective good faith qualified immunity defense.

Albeit without addressing the standards for granting summary judgment, the trial court's opinion, as well as that of the Fifth Circuit, finds there to be no genuine issue of material fact in this case, and that, as a matter of law (1) the executive defendants acted in subjective good faith and (2) the legislative defendants did not conspire to deprive the plaintiff of his constitutional rights. Rule 56, F.R.C.P.

Under the "second branch" of the test laid down in Wood v. Strickland, 420 U.S. 308, 43 L.Ed 2d 214, 95 S.Ct. 992 (1975), this means that the lower courts have determined as a matter of law that the executive defendants did not act "with a 'malicious intention' to

deprive the plaintiff of a constitutional right or to cause him 'other injury.'" Procunier v. Navarette, 434 U.S. 555, 566, 55 L. Ed 2d 24, 33, 98 S.Ct. 855 (1978). See also, Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed 2d 90, 94 S.Ct. 1683 (1974).

This Court observed in Butz v. Economou, 438 U.S. 478, 508, 57 L.Ed 2d 895, 916-917, 98 S.Ct. 2894 (1978), that suits for damages involving constitutional violations need not always proceed to trial, but might in some instances be disposed of on a "properly supported motion for summary judgment based on the defense of immunity." This language led the Court of Appeals for the District of Columbia Circuit to the conclusion that this Court was recommending "resolution of the immunity issue, when possible, on summary judgment," even upon the question of subjective bad faith. See Halperin v. Kissinger, 606 F. 2d 1191, 1209 (D.C. Cir. 1979), cert. granted, _____ U.S. _____, 64 L.Ed 2d 807, _____ S.Ct. _ (1980). The Halperin court, however, ac-

knowledged that a pretrial inquiry into the subjective intent issue "frequently cannot be resolved without the direct testimony of those involved." 606 F.2d at 1209.[56] Of course, such caution has always been a hallmark in cases involving subjective intent and motive. For example, the Fifth Circuit in Slavin v. Curry, 574 F.2d 1256, 1267 (5th Cir. 1978), modified in part on other grds., 583 F. 2d 779 (5th Cir. 1978), quoted with approval the following language from Conrad v. Delta Air Lines, Inc., 494 F.2d 914, 918 (7th Cir. 1974):

> "Cases in which the underlying issue is one of motivation, intent or some other subjective fact are particularly inappropriate for summary judgment, as are those in which the

56. The court appropriately footnoted a quote from this Court's opinion in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L.Ed 2d 458, 464, 82 S.Ct. 486, 491 (1962), where it was observed that summary judgment "should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

issues turn on the credibility of the affiants."

In Imbler v. Pachtman, 424 U.S. 409, 419, 47 L.Ed 2d 128, 137, 96 S.Ct. 984, n. 13 (1976), this Court addressed the procedural distinctions between the qualified and absolute immunity defenses:

> "The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial."[57] (Emphasis added).

57. The petitioner recognizes that Imbler was decided prior to Economou, and that this Court in Imbler was not addressing the distinctions between the "objective" and "subjective" qualified immunity defenses. The petitioner further concedes that the Halperin court was eminently correct when it asserted that the "objective" test can frequently be resolved at the pretrial stages while the "subjective" test cannot. However, this Court in Imbler was, in the petitioner's opinion, specifically reiterating the universally recognized inadvisability of disposing, on summary judgment, of an issue requiring examination into one's motive and subjective intent.

The petitioner does not believe that this Court, in its summary judgment suggestion in Butz v. Economou, supra, intended to admonish the lower courts to dispose of subjective good faith defenses on motions for summary judgment. The trial court in the instant case delved into the absolute immunity of the executive defendants,[58] and the parties consumed considerable space in their Fifth Circuit briefs arguing the absolute immunity issue. While the Fifth Circuit panel held the executive defendants were protected by qualified immunity,[59] its opinion is interspersed with comments tending to indicate that it believes absolute immunity applies.[60]

58. See Appendix, pp. A15-A16, A18, A24, A26.

59. See Appendix, p. A48.

60. E.g., "Gray was specifically charged by the governor with investigating the charges. He did exactly that, concluding that the actions complained of were abuses of significant magnitude to warrant discharge." See Appendix, p. A48.

"With regard to Cummings, the court found both investigation and report to have been conducted according

If absolute immunity did apply, this case would take on a significantly different posture, because we believe the Butz v. Economou "suggestion" does indeed encourage summary disposition in cases where officials "bear the burden of showing that public policy requires an exemption of that scope." Butz v. Economou, supra, 438 U.S. at 506, 57 L.Ed 2d at 916, 98 S.Ct. at _____. There is nothing, however, in the record establishing that the activities of these executive defendants even approached such a requirement.

In its finding that there is insufficient evidence in the record to establish an issue of fact as to whether the legislative defendants conspired with each other or with the executive defendants, the Fifth Circuit panel was in sharp disagreement with the trial court, which found an existing issue of fact as to the malice of the legislative defen-

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to orders and within the scope of official authority. We find no evidence to even hint at an opposite conclusion." See Appendix, p. A51.

dants,[61] as well as to the existence of a conspiracy.[62] The existence of a con-conspiracy, just as the issue of good faith, "is essentially a factual issue that the jury, not the trial judge, should decide." Adickes v. S. H. Kress and Company, 398 U.S. 144, 176, 26 L.Ed 2d 142, 164, 90 S.Ct. 1598 (1970); (separate concurring opinion of Justice Black). In Adickes, the petitioner had asserted that "although she had no knowledge of an agreement between Kress and the police, the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the noncircumstantial evidence of the conspiracy could only come from adverse witnesses," and this Court concluded that "on the basis of this record, it was error to grant summary judgment." 398 U.S. at 157, 26

61. See Appendix, p. A23.

62. See Appendix, p. A11.

L.Ed 2d at 154, 90 S.Ct. at _____.[63]

For the reasons stated, the granting of summary judgment on the issue of the good faith of the executive defendants has involved an important question of federal law which has not been settled by this Court, making certiorari appropriate in this case under Supreme Court Rule 17.1(c). As to summary judgment in cases of conspiracy, the Court of Appeals has decided a federal question in conflict with the decisions of this Court, making certiorari

63. The various contacts of the defendants outlined in the Statement of the Case and in the opinions of the trial and appellate courts in this case constitute more evidence of a conspiracy than was shown in Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979). In Crowe, the court said:

> "This requirement [that the defendants agreed to commit an illegal act] must often be met by circumstantial evidence; conspirators rarely formulate their plans in ways susceptible of proof by direct evidence. (Citations omitted). The evidence here showed that the defendants had participated in private meetings at which Crowe was discussed. From this evidence and the testimony regarding the defendants' course of conduct toward Crowe, the jury could have inferred that a conspiracy existed."

595 F.2d at 993.

appropriate under the last clause of Rule 17.1(c).

2. Legislative immunity does not protect a state legislator from liability for actions taken outside the sphere of legitimate legislative activity, even though he may be engaging in legislatively related activity when he takes the action.

The Court of Appeals has correctly observed that the legislative committee upon which the legislative defendants served was dissolved on June 3, 1976.[64] The court, citing Tenney v. Brandhove, 341 U.S. 367, 376, 95 L.Ed 1019, 1027, 71 S.Ct. 783, 788 (1951), said:

> "Thus, we must conclude that the actions of Jones and Holmes taken during the pendency of the committee were protected by this rationale."[65]

In so holding, the court has overlooked an analysis of the particular activity the legislators were engaged in, and has held that all such actions taken during the pendency of the

64. See Appendix, p. A38.

65. See Appendix, p. A54.

committee were immunized unless "there was a usurpation of functions exclusively vested in the judiciary or the executive," quoting Tenney v. Brandhove, supra, 341 U.S. at 378, 95 L.Ed at 1028, 71 S.Ct. at 789.[66]

From a reading of the Fifth Circuit opinion, one can tell that "[d]uring the hearings, Jones stated that funds were 'squandered', and Holmes asserted that Cole did not work on all the days for which he received pay."[67] Since these statements were made during hearings in which the legislators were performing the "informing" function of securing facts for legislative purposes, the petitioner concedes that they are protected by legislative immunity.

However, the appellate court also observed that Cummings "was contacted by Senator Jones immediately on [his] arrival [in March of 1976], and met with him on several occa-

66. See Appendix, p. A54.

67. See Appendix, p. A37.

sions to discuss the charges."[68] These contacts, all made "during the pendency of the committee" were admitted by Jones to have had nothing to do with "informing" him or the committee members, but rather:

> "[W]e looked upon Major Cummings as another governmental agency, as we did the GAO and any other agency; and we were there to work with them and cooperate with them. We were not interrogating or investigating. We did not look upon Major Cummings as a witness."[69] (Emphasis added).

In Hutchinson v. Proxmire, 443 U.S. 111, 132-133, 61 L.Ed 2d 411, 429-430, 99 S.Ct.

68. See Appendix, p. A38. Actually, Cummings only met with Jones once, and that was in a meeting of the legislative committee at which Holmes was also in attendance, but Jones did telephone Cummings several times thereafter. Record, Cummings Deposition, Vol. I, pp. 6078. Jones (and to some extent, Holmes) suggested to Cummings several matters he wanted Cummings to investigate. See Record, Exhibit 9 to Plaintiff's Supplemental Affidavit of June 30, 1978 (in separate binder).

69. Record, Jones Deposition, pp. 91-92.

2675 (1979),[70] this Court dissected the two so-called "informing" functions. In the first sense, that of congressional efforts to inform itself through committee hearings, the function is within the sphere of legitimate legislative activity and is protected by immunity. However, Hutchinson flatly holds that the process of informing others about legislative activities "is not a part of the legislative function or the deliberations that make up the legislative process" and is therefore not protected by immunity. 443 U.S. at 133, 61 L.Ed 2d at 430, 99 S.Ct. at _____.

The contacts by Jones and Holmes with Cummings, even while the legislative committee was "pending," where they undertook to "cajole

70. Hutchinson was a case decided under the Speech or Debate Clause, and the Court of Appeals was correct in asserting (at Appendix, p. A53) that the Clause does not extend to a state legislator. See United States v. Gillock, 445 U.S. 360, 63 L.Ed 2d 454, 100 S.Ct. 1185 (1980). However, we believe the Fifth Circuit was also correct in asserting that the Tenney v. Brandhove (state legislative) immunity "is limited by the same considerations articulated in Hutchinson." See Appendix, p. A53.

and exhort with respect to the administration of a federal statute . . . is not protected legislative activity." Gravel v. United States, 408 U.S. 606, 625, 33 L.Ed 2d 583, 602, 92 S.Ct. 2614, 2627 (1972). Gravel emphasized that when the immunity protection is lost, it is because of the conduct engaged in and the specific involvement of the legislator. Thus, legislative committee members cannot suspend their investigative processes, "cajole and exhort" with a member of the executive branch, conduct an illegal conspiracy with him, and then claim the protection of legislative immunity from liability for their actions.[71]

The protection afforded the legislative defendants is in conflict with prior decisions of this Court, and certiorari is appropriate

71. Jones' threat made to the plaintiff regarding Jones' "promotion papers (see Appendix, p. A42), and his confidential admonition to the plaintiff to "chage sides" or "they" would get Cole's job (Record, Plaintiff's Affidavit, August 7, 1978, p. 18), both made before the committee was dissolved, are also not protected by legislative immunity.

under the last clause of Supreme Court Rule 17.1(c).

3. Paul v. Davis does not prohibit recovery of damages for defamation under 42 U.S.C. § 1983 when the defamatory remarks constitute a continuing assault on a property interest.

The plaintiff was ordered reinstated to his state merit system position on July 28, 1977, but back pay for 33 days was denied him at that time, he was reduced by Gray from a division chief to a branch chief within the division after that date, and Gray continued to seek to withdraw Cole's federal recognition after that date, the loss of which would have automatically disqualified Cole from holding his state merit system job.[71]

The Court of Appeals, citing Paul v. Davis, 424 U.S. 693, 47 L.Ed 2d 405, 96 S.Ct. 1155 (1976), held that "[i]nsofar as the complaint alleged an injury by defamation alone, referring to negative public statements made by the defendants, the district court was correct in finding no cause of action under the

71. Record, pp. 466, 504.

Civil Rights Act."[73] This appears to imply that any statements made by the defendants after the plaintiff was reinstated are not actionable under Paul. Paul simply held that prior cases of this Court did not "establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701, 47 L.Ed 2d at 405, 96 S.Ct. at _____.[74]

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73. See Appendix, p. A55. The plaintiff claimed damages for lost wages and expenses, as well as for mental pain and anguish, and punitive damages.

74. This Court observed in Paul that there were constitutional interests created by state law and others by the Bill of Rights which could add constitutional stature to a defamation claim, and also cautioned that "[o]ur discussion in Part III is limited to consideration of the procedural guarantees of the Due Process Clause and is not intended to describe those substantive limitations upon state action . . . ." 424 U.S. at 710, 47 L.Ed 2d at 419, 96 S.Ct. at _____, n. 5. Here the plaintiff has asserted punishment for the exercising of rights secured to him under the FIRST AMENDMENT, as well as the loss of property interests in his employment. Further, the plaintiff asserted that the actions of the defendants violated his substantive,

The Fifth Circuit has heretofore recognized that Paul is inapplicable where protected liberty and/or property interests are adversely affected by the challenged conduct and the defamatory statements are made in conjunction with that conduct, and has developed a "stigma-plus" test. See Moore v. Otero, 557 F.2d 435 (5th Cir. 1977). In Marrero v. City of Hialeah, 625 F.2d 499, 513 (5th Cir. 1980), the court discussed the "the Pale of Paul" and observed:

> "Thus, Paul simply holds that no liberty or property interest is infringed when the only loss suffered at the hands of the government is damage to personal reputation if personal reputation is not recognized by the relevant state law as a liberty or property interest." (Emphasis in original).

Citing Owen v. City of Independence, 445 U.S. 622, 63 L.Ed 2d 673, 100 S.Ct. 1398 (1980),

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as opposed to procedural, rights to due process of law.

the Marrero court observed:

> "Hence, it is now apparent that the defamatory communication need not cause the loss of the protected right, or more tangible interest, in order to satisfy the stigma-plus requirement of Paul. Instead, it is sufficient that the defamation occur in connection with, and be reasonably related to, the alteration of the right or interest . . . . In Owen, the defamation did not cause the employee's discharge; instead, the fact that the public perceived the charges to be connected to the discharge was sufficient to give rise to a liberty interest."

625 F.2d at 519. (Emphasis in original).

It was not until after all of the defamatory statements were made that Cole's employment was made safe when First United States Army dismissed the proceedings seeking to withdraw his federal recognition.[75]

In assuming that Cole's action after his reinstatement was for damages to his reputation alone, the appellate court overlooked the

75. Record, p. 563.

relevant facts that (1) Cole never did recoup 33 days of his salary; (2) his job status was reduced from a division chief to a branch chief within the division; (3) he faced loss of his employment throughout all of the events made the subject of this suit in that the defendants sought to deprive him of his federal recognition, which would have cost him his job; (4) the loss and threatened loss of his employment damaged his reputation, in addition to the statements made by the defendants; (5) Cole sought damages for mental anguish in addition to damages to his reputation; (6) Cole charged not only that his property interests in his employment were adversely affected, but also that he was punished for exercising rights secured to him under the FIRST AMENDMENT, and (7) that the defendants were engaged in a continued assault on Cole's property interest in his employment throughout the entire course of the proceedings.

Because the Court of Appeals' reliance upon Paul v. Davis is misplaced, the decision

is contrary to prior decisions of this Court, warranting certiorari under Supreme Court Rule 17.1(c).

4. A plaintiff alleging a deprivation of constitutional rights should not be denied full access to federal courts simply because he has utilized available administrative remedies and partially regained lost rights.

In closing remarks of the Fifth Circuit opinion in this case,[76] it said:

> "We close with the observation that the Civil rights Acts on which this suit was predicated do not make the federal district court a forum for the litigation of every controversy surrounding the loss of property interests through state actions. In this instance, the political and governmental processes involved worked to investigate and resolve the allegations against Cole and, after the prescribed procedures had run their course, to restore him to his position.[77] There is no reason and no room for involvement

76. See Appendix, pp. A57-A58.

77. Cole was not totally restored to his position, see Appendix, p. A40, and, to the extent that he was, the defendants had no part in such restoration, but resisted it vigorously. Even "the recommendation that Cole's rank be withdrawn" was not, as the Fifth Circuit indicated, "dropped at the Governor's request" or upon Gray's action. See Appendix, p. A40. First U.S. Army, sua sponte, dropped such proceedings against Cole only after it could not prove Gray's charges against another officer. Record 499-500; 561-63.

on the part of a federal court."[78] (Emphasis added.)

It is inconceivable that one might be barred from a trial in a federal district court case under 42 U.S.C. § 1983 simply because he had prevailed in state and federal administrative processes and partially regained rights lost.[79]

78. It may be true that the federal courts should not be the forum for resolving every controversy surrounding state action assaults on protected property interests. E.g., Bishop v. Wood, 426 U.S. 341, 350-51, 48 L.Ed 2d 684, 693, 96 S.Ct. 2074 (1976). Conversely, however, the federal courts should not be so anxious to close their doors to "First Amendment rights to enforce constitutional rights through litigation" (N.A.A.C.P. v. Button, 371 U.S. 415, 440, 9 L.Ed 2d 405, 422, 83 S.Ct. 328 [1963]), especially since "[f]undamental rights implicit in the concept of ordered liberty, include . . . the right of access to the courts...." Sotto v. Wainwright, 601 F.2d 184, 190-91 (5th Cir. 1979.

79. The Fifth Circuit's recent controversial en banc majority decision in Patsy v. Florida International University, 634 F.2d 900 (5th Cir. 1980), held that a § 1983 plaintiff must exhaust his administrative remedies before instituting his action. It might well be said that the rationale in that case, combined with the decision here, can effectively "whip-saw" out of existence a federal claim under § 1983 where the plaintiff is partially successful at the administrative level. A petition for writ of certiorari in Patsy is presently pending in this Court.

Resort to the "political and governmental processes" by Cole in this case did not afford him anything close to the remedies available under § 1983. See Carlson v. Green, 446 U.S. 14, 64 L.Ed 2d 15, 100 S.Ct. 1468 (1980). "A damages remedy against the offending individual is a vital component of any scheme for vindicating cherished constitutional guarantees. . . ." Owen v. City of Independence, 445 U.S. 622, 63 L.Ed 2d 673, 693, 100 S.Ct. 1398 (1980).[80]

80. In Davis v. Passman, 442 U.S. 228, 248, 60 L.Ed 2d 846, 864, 99 S.Ct. 2264 (1979), after holding that federal actions could be brought directly under the FIFTH AMENDMENT, the Court observed that "were Congress to create equally effective alternative remedies, the need for a damages relief might be obviated."

In Bush v. Lucas, 598 F.2d 958, 961, reh. den., 605 F.2d 554 (5th Cir. 1979), it was held that a demoted federal employee who "was administratively restored to his original status from the date of the adverse personnel action" could not maintain an action under the FIFTH AMENDMENT since he had utilized the available alternative administrative review opportunities. The Supreme Court vacated the judgment for further consideration in light of Carlson v. Green, 446 U.S. 14, 64 L.Ed 2d 15, 100 S.Ct. 1468 (1980). See Bush v. Lucas, 446 U.S. 914, 64 L.Ed 2d 268, 100 S.Ct. 1846 (1980). In Carlson, the Court had held that the Federal Tort Claims Act did not afford an "equally ef-

In Gomez v. Toledo, _____ U.S. _____, 64 L.Ed 2d 572, _____ S.Ct. _____ (1980), a Puerto Rican policeman alleged in a § 1983 complaint that he had been discharged from his position without a pretermination hearing and he was subsequently reinstated with back pay after a posttermination hearing. He brought suit for damages for violation of his procedural due process[81] rights, claiming damages to his reputation. The Supreme Court, although actually dealing with the question of whether the plaintiff must allege in his complaint that the defendant acted in bad faith,

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fective alternative remedy" to a constitutional tort action, because a trial by jury and the possibility of recovering compensatory and punitive damages against individual defendants under the constitutional action were more apropriate remedies, and observed that there was a need for uniformity in the protection of constitutional rights.

81. Here, Cole is not claiming a deprivation of rights to procedural due process, but relies upon allegations that he was arbitrarily and unreasonably treated in his discharge, demotion, and defamation relating to his official duties in violation of his substantive due process rights, and that he was punished for the exercise of rights guaranteed to him under the FIRST AMENDMENT.

nonetheless held that the complaint stated a cause of action. Cf., Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980), cert. den., Thompson v. Turner, _____ U.S. _____, 66 L.Ed 2d 245, _____ S.Ct. _____ (1980).

The direction being taken in the embryonic formation of causes of action brought against federal officials directly under the Constitution under the doctrine of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 29 L.Ed 2d 619, 91 S.Ct. 1999 (1971), seems to be liberally weighted toward allowing a plaintiff to proceed under that doctrine in spite of the availability of alternative and less appropriate remedies, and in spite of the fact that a plaintiff may have availed himself of those remedies.[82]

In the case of this § 1983 plaintiff,[83], however, without even examining

82. See Footnote 80, ante.

83. The defendant Cummings, a federal official, is actually sued directly under the FIFTH and FIRST AMEND-

the effectiveness of the alternative remedies, the Fifth Circuit has sweepingly held that, since Cole has been restored to his position, "[t]here is no reason and no room for involvement on the part of the federal court."

There is no ascertainable logic for making any distinction between the availability and use of alternative remedies by a Bivens-type plaintiff and a § 1983 plaintiff. See Butz v. Economou, 438 U.S. 478, 504, 57 L.Ed 2d 895, 914, 98 S.Ct. 2894 (1978).

Since the issue raised in this portion of the argument has never been decided by this Court and is of significant importance, certiorari is appropriate under Supreme Court Rule 17.1(c).

MENTS in this case, as well as under § 1983 insofar as he acted in concert with state officials.

5. The FIRST AMENDMENT guarantees the right to advocate a strong military defense and to work toward that end, and punishment of the exercise of that right is violative of the amendment's proscription.

Although a panorama of cases could be cited for this argument, a fair summary is found in Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464, 60 L.Ed 2d 360, 99 S.Ct. 1826 (1979):

> "The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members. NAACP v Button, 371 US 415, 9 L Ed 2d 405, 83 S Ct 328 (1963); Eastern Railroad Presidents Conf. v Noerr Motor Freight, Inc., 365 US 127, 5 L Ed 2d 464, 81 S Ct 523 (1961). The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy, NAACP v Button, supra, or by imposing sanctions for the expression of particular views it opposes, e.g., Brandenburg v Ohio, 395 US 444, 23 L Ed 2d 430, 89 S Ct 1827, 48 Ohio Ops 2d 320 (1969); Garrison v Louisiana, 379 US 64, 13 L Ed 2d 125, 85 S Ct 209 (1964).

The Fifth Circuit panel has said "there is not one iota of substantiation for [Cole's] allegation that he was fired in retaliation for utterances protected by the First Amendment."[84] Conversely, the record establishes that the plaintiff continually espoused the cause of enlarging the Alabama Army National Guard in support of his political belief in a strong national defense.[85] He worked long hours in support of that belief, and produced significant results.[86] The defendant Cummings did not share that belief, and expressed his disagreement with that belief when he wrote his report.[87] Cummings has admitted that he was not interested in whether Cole's work and contributions to

84. See Appendix, p. A56.

85. Record, Plaintiff's Affidavit, June 30, 1978, at p. 8 (in separate binder).

86. Record, pp. 661-662.

87. See Appendix, p. A43; Record, pp. 428, 471; Cummings Deposition, Vol. I, pp. 116-139. Cummings was highly critical of the plaintiff's efforts toward in-

the recruiting program were successful, but has said "the value of the work is not in question."[88] Jones testified that the plaintiff "ought to be punished no matter how much [he] worked and no matter how much [he] produced."[89]

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creasing the size of the National Guard. On page 7, ¶32, of the ROI, he said, "In view of the not unlimited resources available within Alabama, one must necessarily question the motivations behind decisions which resulted in substantial increases in authorized strength at a time when the ARNG units as a whole were experiencing difficulty maintaining their authorized requirements." Record, 428. Cummings was puzzled by the fact that Alabama was expanding so rapidly even though the state program was already "enjoying moderate success." Record, 428. He also reported that "[b]ased upon subsequent developments, there is absolutely no question that Alabama could have easily maintained its authorized strength with reasonable effort and reasonabale expenses." Record, ROI, p. 6, ¶30, Exhibit 1 to Gray's Verified Answer. These statements, among numerous others, clearly establish that Cummings' report was aimed at curtailing the beliefs and efforts of the plaintiff and others to work to expand the size of the Alabama National Guard. The plaintiff insists that he had a FIRST AMENDMENT right to perform his job and stand for his beliefs in his work. None of the defendants had a license to punish him for the exercise of those rights.

88. Record, 471; Cummings Deposition Vol. II, p. 107.

89. Record, Jones Deposition, pp. 66-67.

Gray testified that he had never examined the results of the extra work done by Cole to determine whether it was productive.[90]

The state personnel board summed up the basic charge against Cole as follows:

> "However, the Report does not state, nor does any other evidence presented at this hearing show, that Colonel Cole or other officers violated any law or National Guard policy, rule or regulation by such utilization of recruiting Man-day Spaces, i.e., by serving on active duty on weekends and holidays to perform recruiting work, nor is there any allegation or proof that Colonel Cole did not in fact work on those days on which he was on active duty. Rather, the charge is essentially that he worked more than he should have worked. It seems clear that in so doing he was acting within his authority and with at least the tacit approval of his superiors, both in the Alabama State Military Department and in the National Guard Bureau.[91] (Emphasis added).

90. Record, Gray Deposition, pp. 70-71.

91. Record, pp. 64, 496-497, Exhibit 8 to Gray's Verified Answer.

While great emphasis has been placed upon the alleged "excessive" use of man-day spaces, it defies imagination that not one of the defendants has ever bothered to examine the results of that work, which everyone admits was long, arduous, and expensive. Cole's evidence that his work substantially and directly contributed to the tremendous success of the Alabama recruiting and retention program stands unrebutted.[92]

Another FIRST AMENDMENT factor in this case is that Jones intended to punish Cole for Cole's role in forwarding his promotion papers to the National Guard Bureau, and Jones' threat made to the plaintiff recorded in the Fifth Circuit's opinion expresses that intent.[93] Also, Jones told the plaintiff that if he did not "change sides," he knew

92. Record, p. 459 (Affidavit of Arthur U. Hathorn); Record, Plaintiff's Affidavit, June 30, 1978, at pp. 2-7 (in separate binder).

93. See Appendix, p. A42.

"they" could get Cole's job.[94]

With this evidence in the record it is difficult to understand how the Fifth Circuit panel could have found not "one iota" of substantiation for Cole's FIRST AMENDMENT claim. Certainly, there was sufficient evidence from which a jury could have determined that Cole's protected speech and activity played a "substantial role" in the defendants' decisions to accuse him of wrongdoing and seek to discharge him. See Givhan v. Western Line Consolidated School District, 439 U.S. 410, 58 L.Ed 2d 619, 99 S.Ct. 693 (1979); Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 50 L.Ed 2d 471, 97 S.Ct. 568 (1977).[95]

Because the Fifth Circuit opinion is contrary to prior decisions of this Court regard-

94. Record, Plaintiff's Affidavit, August 7, 1978, p. 18.

95. Since whether the defendants' actions were motivated by a desire to punish Cole for the exercise of FIRST AMENDMENT rights is a question of motive, intent, or subjective feelings, what has been said in paragraph 1 of the argument portion of this petition would also apply to this issue.

ing FIRST AMENDMENT protection, certiorari is appropriate under the last clause of Supreme Court Rule 17.1(c).

This case presents questions of significant national importance involving the propriety of an all-volunteer Army versus the compulsory draft and the significant work and accomplishments that have gone into the recruiting and retention program. Whether the defendants made intentionally false allegations against one who thought he was working in accordance with law and in the national interest is an issue considered to be peculiarly appropriate for a federal judicial forum to decide. For these and the foregoing reasons, it is respectfully requested that this Honorable Court will grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review the questions presented herein.

Respectfully submitted,

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* * * * * * * * * * * * * * * *

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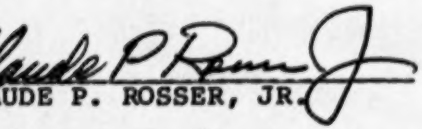

CLAUDE P. ROSSER, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Petition of William R. Cole for Writ of Certiorari upon Honorable Wade McCree, Solicitor General of the United States, Honorable William B. Moore, Jr., Honorable Robert D. Segall, Honorable Sarah Greenhaw, Honorable Sterling Culpepper, and the Deputy Assistant Judge Advocate of the Department of the Army, Attorneys for the Respondents-Defendants, by placing said copies in the United States Mail, postage prepaid,

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THIS the 29th day of JUNE, 1981.

Claude P Kenner Jr
NOTARY PUBLIC

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
1980-81 TERM

WILLIAM R. COLE,

PETITIONER-PLAINTIFF

VS.

HENRY B. GRAY, III, FRANCIS J. CUMMINGS, FRED R. JONES and ALVIN HOLMES, EACH INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITY,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

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* * * * * * * * * * * * * * * * *

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IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM R. COLE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.
	)	78-83-N
HENRY B. GRAY,III,	)	
Etc.; ET AL,	)	FILED
	)	DEC 11 9:05 AM 1978
Defendants.	)	JANE P. GORDON, CLERK
		U.S. DISTRICT COURT
		MIDDLE DISTRICT OF ALA.
		DEPUTY CLERK

MEMORANDUM OPINION

This cause is submitted on Defendants' motions for summary judgment, affidavits and depositions, and brief of all parties. Plaintiff sues for relief under 42 U.S.C. 1983, 1985, for conspirary [sic] to cause his loss of his job as a colonel in the Alabama National Guard and for loss of that job.

Based on undenied evidence in the file, this Court finds that Defendants, Senator Jones and Representative Holmes, during and after an Alabama legislative investigation of

the Alabama National Guard's alleged misuse of federal funds, made statements which may be argued to have been intended to cause the Plaintiff to lose his job; that Defendant Cummings, a regular Army investigator, was ordered to Alabama "to determine the propriety of utilization of (federal) recruiting and retention funds by officials of the Alabama National Guard;" and that Defendant, Major General Gray, relieved the Plaintiff of his National Guard commission and recommended that the Plaintiff's regular Army commission be terminated.

Defendant Cummings conducted an investigation and found that it was an Alabama National Guard practice well known to the Plaintiff that certain National Guard regulations were disregarded. Guardsmen, governed by a regulation that recruiting and retention be done only after having previously been ordered to do the same, would, in violation of said regulation, record overtime work in recruiting and retention and thereafter have orders

therefor entered with the approval of Plaintiff Cole. Cummings also found that Cole was aware that officers of the National Guard, while subject to regulations that overtime could be served only on days when they had not previously been on full-time duty and only on days when they served at least eight hours at recruiting and retention, would serve hours on days when they served full-time duty and claim overtime for the aggregate of such hours on other days. Thereafter, Defendant Cummings, after itemizing many of such violations of regulations, reported that Plaintiff Cole "grossly abused the public trust and confidence" placed in him "by taking repeated advantage of an inadequately controlled program" in being paid for overtime work and of "greening *** the pockets" of the Plaintiff and other officials and that the Plaintiff was guilty of "vehement abdication" of responsibility in allowing the itemized violations of regulations to result in what "literally constituted a fraud against the federal govern

ment amounting to several hundred thousand dollars annually." Defendant Cummings recognized that the recruiting and retention by the Alabama National Guard was outstanding but reported that "from all indications, *** the ultimate cost *** would have been substantially less" had the regulations not been violated. Cummings recommended the dischage of other National Guard officers but not of the Plaintiff.

The Plaintiff sues for being deprived of his job for a short time and for the accompanying bad publicity associated with the report of Defendant Cummings and the remarks of the other Defendants associated therewith.

Defendant Gray is charged with having discharged the Plaintiff for having violated the regulations; with having compared the Plaintiff to a "rotten apple in the barrel"; and with having made the statement that the day of reinstatement of the Plaintiff and other National Guard officers to their State merit system positions was "a sad day for hon-

esty and integrity in government". Defendant Gray, in his letter dismissing the Plaintiff from his State merit system job with the Alabama National Guard, stated that the Plaintiff had "abused the public trust and confidence", had violated his oath of office, had made "false and misleading statements to investigative officers", had "knowingly falsely" certified records, had been guilty of criminal conduct in that he "knowingly and willfully manipulated, misrepresented, falsified, and concealed material facts in connection with official documents," and had "acted in a manner *** subversive to constitutional government." In asking the First United States Army to strip the Plaintiff of his federal recognition as a colonel in the Army National Guard, Defendant Gray charged the Plaintiff with "substandard performance and moral and professional dereliction," abuse of the recruiting and retention program "for his personal benefit, violation/abuse/circumvention of the policies/intent of appropriate State and/or fed-

eral laws, disregard for established regulations and policies, failure to properly perform duties, misrepresentation of material facts, displaying defective attitudes towards duties, abuse of the public trust and confidence, conduct unbecoming an officer," and "bringing discredit upon the Army National Guard."

In regard to the amount of overtime claimed by Plaintiff Cole, and it is significant that he claimed as much as 458 days' work during at least one of the years in question and over 400 days' work for each of several other years, it is clear that it is legal for a National Guardsman to work on Saturdays and Sundays of a week where he has worked all prior days of the week and to receive four days' credit for the two days' overtime work. If this is done after the guardsman is ordered to do that work, it is entirely legal for him to claim 11 days of work for each week, and he could, therefore, legally claim 458 days during a year. The primary significance of the

amount of overtime work is that it created suspicion that the guardsman in question had no reason to work so much overtime and that, since he had violated the regulations in claiming overtime without prior orders to work overtime and since he had aggregated overtime or approved aggregation of overtime on days when he had already worked full time, all in violation of regulations, the excessive amount of overtime might be a suspicious circumstance from which one could guess that the claim for overtime had been padded. However, it is clear that the parties to this suit do not insist that there is competent evidence of padding of overtime, and they are satisfied to base their case purely on the violation of regulations. This was the cause for the disciplinary actions taken against the Plaintiff.

The Defendants realize that they have no way to prove whether or not Plaintiff Cole actually spent as much time as he was paid for in recruiting and retention, and they do not make an issue of that question. They do, how-

ever, point to their suspicions of overtime claimed but not actually worked in justifying the very regulation which they insist, and it is admitted, that Plaintiff Cole either violated or tacitly approved violations of, that is, the logging of overtime prior to the same having been ordered.

It is agreed by all parties that the suspension and ultimate dismissal of Plaintiff Cole and his subsequent reinstatement was a part of an overall disciplinary action taken against 14 of the higher ranking Alabama Army National Guard officers for an Alabama guard-wide policy of violating certain regulations.

Plaintiff Cole insists that the disagreement between the Cole-Rollo faction, as to what Plaintiff insists is a strong National Guard, and the Cummings faction, which the Plaintiff calls a weak National Guard philosophy, is indicative of the basis for the alleged conspiracy to unseat the Cole faction from the higher positions in the State Na-

tional Guard. See, Griffin v. Breckenridge, 403 U.S. 88.

Some of the Defendants insist that there could have been no conspiracy since some of the alleged conspirators did not even see or talk to others for long periods of time during the pendency of the alleged conspiracy, and there is no substantial direct evidence of the conspiracy.

Proof of knowledge of a conspiracy must be clear and unequivocal, but it is not necessary to show that a conspirator had knowledge of every element of the conspiracy, United States v. Fellabaum, 408 F.2d 220 (7th Cir. 1969). It is not necessary in establishing an unlawful conspiracy that any simultaneous action or agreement on the part of each conspirator be shown, Hazeltine Research, Inc. v. Zenith Radio Corp., 239 F.Supp. 51, 77, reversed on other grounds 388 F.2d 25, affm'd. in part, reversed in part on other grounds 395 U.S. 100. It is not necessary to prove that each conspirator knew the exact limits of the

illegal plan or that each knew the identity of all of the participants in the scheme. A single plan should be shown, the essential nature and general scope of which was known to each conspirator though he need not know every element of the general plan. Hoffman-LaRoche, Inc. v. Greenburg, 447 F.2d 872, 875; Koehler v. Cummings, 380 F.Supp. 1294, 1313.

> "*** (C)onspiracies involving *** elaborate arrangements generally are not born fully grown. Rather, they mature by successive stages which are necessasry to bring in the essential parties. And not all of those joining in the earlier states make known their participation to others later coming in. The law does not demand proof" that all conspirators know about the acts of all other conspirators. "For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The law allows the conviction of those actually discovered without requiring evidence of knowledge of all its details or of the participation of others." Blumenthal v.

United States, 332 U.S. 539, 557 (1947).

This Court is of the opinion that this case involves evidence supporting an issue of fact as to whether the alleged conspiracy existed and whether the Defendants were party thereto.

OFFICIAL IMMUNITY

The Defendants all contend that they were immune by their official status from suit for their actions charged against them in this proceeding. Immunity has generally been recognized where the plaintiff is seeking to obtain government funds to obtain property in the government's possession or to control the disposition of property in the government's possession. Great Northern Life Ins. Co. v. Read, 322 U.S. 47; Carolina Glass Co. v. South Carolina, 240 U.S. 305; Murray v. Wilson Distilling Co., 213 U.S. 151; Hagood v. So., 117

U.S. 53; Louisiana v. Jumel, 107 U.S. 711. Courts have gone to great lengths to shield federal officials on occasion from liability for their acts within the scope of their authority. In Gregoire v. Biddle, 177 F.2d 579, 581, cert.den. 339 U.S. 949, the plaintiff, suspected of being a German enemy agent during World War II, was arrested and confined for many months by order of the Attorney General of the United States and brought suit for deprival of his liberty without due process of law since he was neither charged with a crime nor given an opportunity for a hearing during all the period of time of his confinement. In Norton v. McShane, 332 F.2d 855, cert.den. 380 U.S. 981, plaintiffs, suspected of wanting to lend aid and comfort to the riots at the University of Mississippi when blacks were ordered admitted to that University, were arrested and held without benefit of having been charged or given a hearing as to any criminal activity. These two suits against the high Department of Justice officials were dismissed

on motion for summary judgment on the basis of the official immunity of the federal officials so charged. In both of these cases, federal officials had obviously violated the constitutional right of the plaintiffs not to be deprived of their liberty without due process of law, but basing a defense on the doctrine of official immunity, the courts declined relief to the plaintiffs. For an apparently opposite conclusion, see Kelley v. Dunne, 344 F.2d 129, reversing 230 F.Supp. 969, where a federal game warden similarly charged with constitutional encroachments was not found immune to suit. In Ex parte Young, 209 U.S. 123 (1908), the court relied on the fact that a State officer was "stripped of his official or representative character" by his unconstitutional conduct. In that case, the court allowed prospective relief in the form of an injunction but not retroactive relief in the form of damages.

The case of Ex parte Young, supra, enunciated the principle that the Eleventh Amend-

ment provided no shield for a State official confronted by a claim that he had deprived another of a federal right under the color of State law. The Supreme Court in Scheuer v. Rhodes, 416 U.S. 232 (1973), demonstrates that State officers, who reasonably believe in good faith that their action is legal, have a qualified immunity from suit for their unconstitutional acts done within the scope of their authority. This doctrine places the burden on the defendant of proving that the defendant reasonably believed in good faith that his action was constitutional. The Supreme Court in Butz v. Economou, 46 U.S.L.W. 4952, 4958, _____ U.S. _____, held that policies of immunity applicable to State officials are also applicable to federal officials. It would, therefore, see that, where a federal official is charged with violating the constitutional right of an individual within the scope of his official authority, he is immune to suit therefor if he can establish by a preponderance of the evidence that he had a reasonable

belief in good faith that his action was constitutional.

The case of Butz v. Economou, supra, is relevant to this cause additionally in that it recognizes the need for unqualified or absolute immunity to officials where absolute immunity is essential to the conduct of the particular public business. This immunity is granted to court and administrative officials where those officials are affording judicial or quasi-judicial hearings to individuals.[1] That immunity is applicable to administrative law judges, hearing officers, agency officials performing functions analogous to those of prosecutor, and agency personnel who present evidence on the record in the course of adjudication. Butz v. Economou, supra, (at page 4963 in Rehnquist Opinion). Defendant Gray

1/ Judicial immunity is unqualified, Bradley v. Fisher, 13 Wall (80 US) 335; Pierson v. Ray, 386 U.S. 347; and is extended to prosecutors, Yaselli v. Goff, 275 U.S. 503; Imbler v. Pachtman, 424 U.S. 409.

likens his acts in this case to those of a hearing officer, and Defendant Cummings claims the immunity of agency personnel who presents evidence on the record in the course of adjudication.

The case of Paul v. Davis, 424 U.S. 693, indicates that one's good name, as smeared by defamation, is not a liberty or property interest for which a protection is provided by 42 U.S.C. §§1983, et seq., or the Due Process Clause of the United STates Constitution. Defendants in this cause, however, are charged with conspiring to cause Plaintiff Cole to lose his job, a property interest, and with spreading defamatory information which would naturally tend toward causing the loss of that job. This is, therefore, mor than a defamation action, and the Plaintiff contends that the loss of a job for the period of time that the Plaintiff was suspended or discharged without pay justifies consideration of this suit. If the Plaintiff has a cause of action for loss of his job, the fact that other agen-

cies restored his job is relevant only to the question of damages.

All Defendants are public officials. To the extent that they were acting within the scope of their authority as public officials and did not violate the constitutional rights of the Plaintiff, they are absolutely immune from suit. They are not responsible for damages caused by their attending to their official functions within their constitutional authority. It is necessary that public functions be freely exercised without fear of suits, and he who is harmed thereby must bear his own harm. The Supreme Court in Scheuer v. Rhodes, supra, at 240, recognizes that immunity is based on two "independent rationales":

> "(1) The injustice, particularly in absence of bad faith, of subjecting to liability an officer who is required by the legal obligation of his position, to exercise discretion;
>
> "(2) The danger that the threat of such liability would deter his willingness to execute his office with

the decisiveness and judgment required by the public good."

If a public official acts outside of his official authority, anyone damaged thereby may have a suit for damages proximately resulting therefrom. If the public official acts within the scope of his official authority and absolute immunity is essential for the conduct of the particular public business, the official is absolutely immune even if his act violates constitutional rights of the plaintiff. Butz v. Economou, supra, 46 U.S.L.W. at 4960. If he acts wihin the scope of his authority but thereby violates the constitutional rights of a claimant and absolute immunity is not essential for the conduct of the particular public business, the defendant is qualifiedly immune and has the burden of showing that his unconstitutional actions were done in good faith with a reasonable belief that he acted constitutionally therein.

A judicial officer, in the act of judging, may lose his temper with one of the lawyers. He may constitutionally fine him and put him in jail for contempt of court or he may take his gavel and strike the attorney, thereby acting unconstitutionally and beyond the scope of his employment. The fine or incarceration for contempt of court is a judicial act and is constitutional even though it may exceed the legal limits therefor. The striking of the attorney is outside of the scope of judicial authority and is an unconstitutional summary punishment for which the judge may be sued for damages. He may, however, escape liability therefor if he is able to establish by a preponderance of the evidence that he acted in good faith believing that he acted within the scope of his authority and that he acted constitutionally. An example would be where the judge in good faith reasonably believed that he was acting in self-defense.

As to a member of the legislative branch of government (such as Senator Jones or Representative Holmes), a legislator or congressman is acting within the scope of his official authority and immune from suit if he is doing an act delegated by law to the legislative branch. Clearly, any discussion of a proposed law on the floor of the Legislature or in a committee meeting is a proper legislative function. Investigation is an appropriate auxiliary to the legislative function when the information sought from material witnesses furthers the subject of proposed legislation. However, immunity does not attach to improper dissemination of defamatory information outside the legislative process. Hutchinson v. Proxmire, 579 F.2d 1027 (7 CAA 1978). A member of Congress may call persons to investigate rumors that a judge had struck a lawyer with his gavel if Congress were bona fidely considering passing a law against judges' assaulting lawyers in federal courthouses; however, he would not be immune to suit for dam-

ages for notifying the newspaper of a false rumor thereof if Congress were not considering taking action thereon. While the public and a legislative officer's colleagues have a legitimate right to know what actually occurs on the floor of the legislative branch which is consistent with official immunity of persons releasing such information to news source groups, that fact would not justify a legislator's maliciously or voluntarily spreading false information calculated to cause the discharge of a member of another branch of the government when the spreading is not consistent with a legislative purpose. The distribution outside of the Legislature must serve some legitimate legislative need in order to afford the distributor immunity from suit. Remarks, calculated to cause discharge or demotion of a public employee, which are made on radio, television or in private communications by a legislative officer, while the Legislature is not considering the questions involved, are not made within the scope of leg-

islative authority, Hutchinson v. Proxmire, supra, and are not ordinarily necessary to carry out the legislative function of informing the public and, therefore, ordinarily are not afforded immunity from suit.

It is, therefore, the opinion of this Court that the actions of the legislative officers in this cause in discussing this case and in making any statements about the Plaintiff in this cause prior to the time the Legislature stopped investigating the matter were privileged and that they may be admitted in evidence only for the purpose of showing the conspiracy or malice or bad faith of Defendants Jones and Holmes and not for any other purpose whatsoever. However, this Court is of the opinion that there is no undenied evidence that any distribution of information by Defendants Jones and Holmes after termination of the legislative investigation of the Alabama National Guard was essential for the conduct of the public business of legislating. There is also no undenied evidence before this Court

that statements or agreements made thereafter by Jones or Holmes were made in the scope of the official authority of said Defendants Jones and Holmes or that they were made in good faith with the reasonable belief that they were not acting unconstitutionally. The element of malice of Jones and Holmes is a further material issue of fact in this cause.[2] Accordingly, Defendants Jones and Holmes' (the legislative Defendants) motion for summary judgment should be denied.

This Court is further of the opinion that Defendant Gray, acting upon the report of Defendant Cummings to the effect that the National Guard officers in question had violated

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2/ The First Amendment privilege of free speech and press insures that one, absent malice, may freely discuss public officials without fear of a defamation suit. New York Times v. Sullivan, 376 U.S. 254. This Court is of the opinion that the same reasoning would require proof of malice in the instant case. Plaintiff Cole was a public person by virtue of his high position in the Alabama National Guard as well as by the great public interest created therein by evidence of alleged improprieties practiced therein.

certain regulations, had an official duty to determine whether or not they should be discharged or whether or not they should be recommended for stripping of their federal rank and that any action that Defendant Gray took in regard to removing said officers from the State National Guard and recommending stripping of their Army rank was within the scope of his official authority as Commander of the Alabama National Guard. There is and can be no evidence to the contrary, and this Court is, therefore, of the opinion that Defendant Gray was acting constitutionally within the scope of his official authority and is immune from suit. This is not altered by the fact that Gray made possibly defamatory statements about Cole after the Personnel Board of Alabama reinstated him. The effect of the reinstatement after loss of 33 days' pay was to approve a penalty of Cole for his indiscretions but to disapprove the severity thereof. Small punishments of Cole, such as the deprival of his key to his offices, were approved

by the Board as reasonable punishment of Cole and, in any event, fall within the ambit of Butz v. Economou, supra, 46 U.S.L.W. 4952, 4960, as follows:

> "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading."

This Court is aware of the admonition of the Supreme Court that:

> "Orderly Government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army be scrupulous not to intervene in Judicial matters." Orloff v. Willoughby, 345 U.S. 83 (1953). See, also, Gilligan v. Morgan, 413 U.S. 1, 10; Schlesinger v. Councilman, 420 U.S. 738; McLucas v. DeChamplain, 421 U.S. 21.

In any event, all evidence indicates that Gray reasonably relieved in good faith that his actions were proper. Scheuer v. Rhodes, supra. To the extent that Gray's statements (made after reinstatement of Cole to his rank) may

have applied to Cole, they did not contribute to a loss of Cole's property and are actionable, if at all, only in the State Court for defamation. Paul v. Davis, supra. Accordingly, Gray's motion for summary judgment will be granted.

This Court is further of the opinion that Defendant Cummings, in investigating the case and in reporting to his superior officers what he found and his opinions and recommendations based thereon[3], all as he was ordered, was also acting within the scope of his official authority and that his motion for summary judgment should, therefore, be granted. The Court fnds no evidence to the contrary. Nothing herein should be construed as a finding by this Court that either Defendant Gray or Defendant Cummings were correct or incorrect in

3/ Cummings reported the good and the bad about Col. Cole and made no recommendation that Cole be disciplined while recommending discipline for several other officers who apparently were more involved than Cole.

doing the things that the Court finds they did within the scope of their authority. That is not the function of this Court as an error by an official in the doing of an act within the scope of his authority is not actionable.

DONE this 11th day of December, 1978.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM R. COLE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.
	)	78-83-N
HENRY B. GRAY,III,	)	
Etc.; ET AL,	)	FILED
	)	DEC 11 9:05 AM 1978
Defendants.	)	JANE P. GORDON, CLERK
		U.S. DISTRICT COURT
		MIDDLE DISTRICT OF ALA.
		M.T.
		DEPUTY CLERK

O R D E R

In accordance with the Memorandum Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the motions for summary judgment filed herein by Defendants Gray and Cummings be, and the same are hereby, granted, and Henry B. Gray, III, and Francis J. Cummings are hereby dismissed as parties Defendant to this cause of action.

It is further

ORDERED by this Court that the motions for summary judgment filed herein by Defendants Jones and Holmes be, and the same are hereby, denied.

This Court is of the opinion that this Order as it relates to the matters determined by this Court herein, involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation within the meaning of 28 U.S.C. § 1292(b). The Court is further of the opinion that, if the Court is in error in dismissing the cases against two Defendants and retaining the cases against the other two, it will be necessary to try the cases separately, though the cases could be tried jointly, and considerable time and money saved if all four Defendants should be tried. This Court also recognizes the possibility that the Curt could be in error in not granting official immunity to the two officials remaining in the case, and in that event, an ex-

pensive trial to the Government and to all the parties may be averted by consideration by the Court of Appeals at this time.

DONE this 11th day of December, 1978.

/s/ R. E. Varner
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-8497

U.S. COURT OF APPEALS
FILED

MAR 14 '79

EDWARD W. WADSWORTH
CLERK

FRED R. JONES, individually
and as State Senator, and
ALVIN HOLMES, individually
and as State Representative,

Petitioners,
Cross-Respondents,

versus

WILLIAM R. COLE,

Respondent,
Cross-Petitioner,

- - - - -

On Applications for Leave to Appeal from an Interlocutory Order

- - - - -

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitions for leave to appeal from the interlocutory order of the United States District Court for the Middle District of Alabama entered on December 11, 1978, are GRANTED.

/s/ SRT

/s/ I.L.G.

/s/ PHR

William R. COLE, Plaintiff-Appellee-
Cross Appellant,

v.

Henry B. GRAY, III, Etc., et al.,
Defendants-Cross Appellees,

Fred R. Jones, individually and as State
Senator and Alvin Holmes, Etc., De-
fendants-Appellants-Cross Appellees.

No. 79-1692.

United States Court of Appeals,
Fifth Circuit.

March 2, 1981.

Appeals from the United States District Court for the Middle District of Alabama.

Before VANCE and GARZA, Circuit Judges and ALLGOOD,* District Judge.

GARZA, Circuit Judge:

This litigation arises from a series of state and federal investigations of wrongdoing

*District Judge of the Northern District of Alabama sitting by designation.

by personnel within the Military Department of the State of Alabama. Among the subjects of inquiry was plaintiff-appellant William Cole, a colonel in the Alabama Army National Guard and chief of one of the military department's divisions. After the investigatory dust had settled, Cole brought this suit against a state senator and state representative who had participated in a legislative survey of the allegations, the adjutant-general of the military department who had dismissed him from his position, and a major in the United States Army who was dispatched to pursue an independent federal inspection.

Cole asserted that the defendants by their conduct with regard to these investigations had wrongfully deprived him of his good name, his right of free speech, and certain property rights related to his guard status, within the cognizance of 42 U.S.C. §§ 1983 and 1985. The defendants interposed various defenses of immunity by motions for summary judgment. The district court granted the mo-

tions of the "executive defendants," but denied those of the legislators.

Cole now appeals from the summary judgment granted the executive defendants, and we have authoried an interlocutory appeal by the legislative defendants from the denial of their motions. For the reasons stated below, we conclude that the judgment of the district court must be affirmed where the motions were granted and reversed where they were denied.

I.

William Cole was for many years a non-probationary employee of the military department, and a federally recognized colonel in the Alabama national guard. He held the permanent merit system classification of Military Executive Officer, and served as chief of the Personnel and Administrative Division of the military department.

During the time that Cole held the latter position, the compulsory military draft was terminated. As a consequence, federal funds

were made available for "recruitment and retention." It is apparent that Cole and other officers were compensated from these funds for time spent in performing recruitment and retention functions. It was not the disbursement of the funds which caused controversy, but the amounts paid out.

In October of 1975, the Alabama legislature passed a resolution creating a joint interim committee to investigate the use of federal funds in the state. The resolution was introduced by State Senator Fred R. Jones. The resulting committee consisted of three Senators, including Jones, and three representatives, including Alvin Holmes.

Holmes moved that the committee look into into affairs in the military department. Senator Jones had been connected with the department in the past, having been named assistant adjutant-general and nominated for the rank of brigadier general by the governor. Time-in-service requirements prevented federal recognition of such a rank. Jones offered to ab-

stain from participation in the investigation of the military department, but the committee refused to accept his move. When hearings on the matter began, therefore, he was an active participant.

The hearings were open to the public and were widely reported by the news media. The committee discovered that high-ranking officers in the department had been paid for a substantial number of extra duty days. In 1975, for example, the following officers received, in addition to their salaries and approximately 48 days of "drill pay," payment for extra duty as shown below:

General Rollo (then adj. gen.)	171 extra duty days
Colonel Speigner	136 extra duty days
Major Hawthorn	179 extra duty days
Colonel Hora	129 extra duty days
Colonel Cole	166 extra duty days

During the hearings, Jones stated that funds were "squandered," and Holmes asserted that Cole did not work on all of the days for which he received pay.

As we have noted, the Interim Committee investigation spawned parallel inquiries. Adjutant-General Rollo asked the Commanding General of the First Army to conduct an investigation. Pursuant to this request, Major Francis Cummings was sent to Alabama to prepare a report of inquiry, arriving in March of 1976. He was contacted by Senator Jones immediately on arrival, and met with him on several occasions to discuss the charges. At one point, Jones asked him to contact the United States Attorney about the matter.

As a result of disclosures at the committee hearings, Governor Wallace acted in May to prohibit officers from receiving extra-duty pay in the absence of written authorization from his office. The interim committee was dissolved by the expiration of its legislative mandate on June 3rd.

Major Cummings' report was filed on September 14th. It levelled two basic charges against Cole: (1) that he excessively used man-days, receiving pay for work that was ap-

parently not necessary, and (2) that he participated in defrauding the federal government out of hundreds of thousands of dollars annually in the method of issuing orders in the Alabama military department. The report was released to the public in March of 1977 at the governor's request, and Adjutant-General Rollo resigned his post. General Henry Gray was appointed to succeed him, taking office with instructions to "clean up the mess."

General Gray contacted Senator Jones and apparently discussed the Military Department problems with him in detail. He later testified that while he was considering an appropriate course of action, he "had a great deal of information from...Senator Jones concerning the legislative subcommittee investigation into the Guard." Gray suspended Cole, and on April 20, 1977, the Colonel received a letter signed by the new Adjutant-General which dismissed him from his non-probationary merit system position. Gray forwarded to the first army a request that Cole be stripped of his

federal recognition as a colonel in the national guard.

Cole appealed his dismissal to the Alabama Personnel Board, which ordered him reinstated. The board was, nontheless, highly critical of the practices which led to the discharge and denied thirty-three days of salary. Gray publicly commentd that the occasion was "a sad day for honesty and integrity in government," and reduced Cole's responsibilities to those of a branch chief within the plans, operations, and training division of the military department. The recommendation that federal recognition of Cole's rank be withdrawn was dropped at the governor's request.

When the news of the Personnel Board's decision was prematurely "leaked," Representative Holmes contacted the State Personnel Director and asked if he could reappear before the board. At a public press conference, he stated his opposition to the reinstatement and called Cole the "most notorious racist out

there." After Gray withdrew his request that federal recognition of Cole's rank be terminated, Holmes was quoted by the press as saying that Cole and other officers were "some of the most corrupt individuals...who have ever served in public office," and that "Wallace says he's for law and order, but he's not for putting while collar criminals behind bars." Holmes expressed surprise that Cole and other officers had not been indicted by a federal grand jury.

II.

Cole filed suit on March 20, 1978, against Jones, Holmes, Gray and Cummings. The thrust of his position was that the defendants had engaged in a campaign of harassment and revenge, seeking to oust him from his position and to punish him for activities which he claimed were necessary, proper, and successful.

Cole's advocacy of a strong guard as an integral component of the national defense was

said to have partially formed the basis of personal and political animosities underlying this "campaign." With regard to Senator Jones, Cole contended that the denial of federal recognition for a brigadier generalship had triggered a crusade of retribution.

Cole asserted that when the senator was informed that hs generalship would not be forthcoming, he introduced the resolution creating the joint interim committee, knowing that Cole had been responsible for contacting the National Guard Bureau on federal recognition matters. Code [sic] has further maintained that Jones told him previously, "If you f*** with my promotion papers, I will spend the rest of my life f***ing you." It was emphasized that Jones' activities continued after the dissolution of the interim committee.

Holmes was accused of having acted along with Jones in creating the interim committee, "to examine and falsely criticize the plaintiff in the conduct of his employment." Also noted were Holmes' contacts with Major Cum-

mings, his efforts to have the Personnel Board's decision overturned, and his comments following Cole's reinstatement.

Cole has asserted that Major Cummings' "possessed an attitude that Alabama had too many people in the National Guard and that potential economic benefits should not be used to encourage recruiting and retention," and that he was thus "fully receptive to the allegations of wrongdoing which were supplied to him by then-senator Jones." In his complaint, Cole accused Cummings of acting in concert with Jones and Holmes to generate and submit false information. It was particularly alleged that Cummings failed to conduct his investigation in accordance with "regulations and law," in that he refused "to properly advise the Plaintiff that he would be the subject of adverse comments in the report."

General Gray was accused of conspiring with Jones and others to deprive Cole of his merit system position. It was allegd that Gray acted upon information which he knew to

be false, and that after reinstatement had been ordered, he "persisted to defame and stigmatize the plaintiff by publicly accusing him of dishonesty..."

The defendants were said to have conspired and acted in concert to deprive Cole of rights secured by the Constitution, and were accused of attempting to achieve his dismissal through false accusations. Jones, Holmes and Gray were said to have acted under color of state law in their official capacities, while Cummings was said to have acted in his capacity as a federal officer, but in concert with the other defendants who acted under color of state law. The specific injuries were said to have been severe damage to Cole's reputation, the temporary loss of his merit system position, and the unwarranted initiation of proceedings to withdraw federal recognition of his rank. Cole sought four million dollars in damages and an injunction against further "harassment."

III.

Each defendant filed a motion for summary judgment. On December 11, 1978, the district court entered an order granting the motions of Gray and Cummings, and denying those of Jones and Holmes. The court found sufficient evidence to create "an issue of fact as to whether the allegd conspiracy existed and whether the defendants were parties thereto."

Noting that "all defendants were public officials," the court based its distinction between the executive and legislative defendants upon an analysis of the various claims of official immunity. It was held (1) that all defendants were not responsible for damages "caused by their attending to their official functions within their constitutional authority;" (2) that Gray and Cummings, as military officers directly concerned with the investigation and remedial measures pursuant thereto, had "an official duty to determine whether or not [Cole] should be discharged or whether or not [he] should be recommended for

stripping of [his] federal rank;" (3) that they acted constitutionally within the scope of official duty, being thus immune from suit; (4) and that Jones and Holmes, as state legislators, possessed an immunity from suit "if [they] were doing an act delegated by law to the legislative branch," but no immunity for the "improper dissemination of defamatory information outside of the legislative process." Further finding that "[R]emarks, calculated to cause discharge or demotion of a public employee, which are made on radio, television or in private communications by a legislative officer, while the legislature is not considering the questions involved, are not made within the scope of legislative authority," and that "there is no undenied evidence before this court that any distribution of information by defendants Jones and Holmes after termination of the legislative investigation of the Alabama National Guard was essential for the conduct of the public business of legislating," the court determined that their mo-

tion for summary judgment should be denied.

IV.

On this appeal, Cole contends that the district court erred in finding Gray and Cummings to have been protected by an official immunity. The legislative defendants argue that the trial court erred in finding them unprotected, and that in any event, summary judgment in their favor was required because Cole failed to raise a fact issue with regard to their alleged conspiratorial participation. We will first discuss the controversy related to the executive defendants.

Both Gray and Cummings assert that on the facts of this case their actions were shielded by the absolute official immunity described in Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), and if we should find to the contrary, that they were clearly within the parameters of the qualified immunity discussed in Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

[1] The district court found that Gray acted within the scope of his authority, and pursuant to a specifically assigned duty to investigate the charges against his officers. It further found that he acted with a reasonable belief, in good faith, that his actions were proper.

Viewing the evidence in the light most favorable to Cole's position, we hold Gray to come within the range of the qualified Scheuer immunity. Gray was specifically chargd by the governor with investigating the charges. He did exactly that, concluding that the actions complained of were abuses of sufficient magnitude to warrant discharge. That the State Personnel Board later disagreed with the sanction imposed does not obviate a conclusion that Gray acted in good faith.

We note that the interim committee investigation was completed months before Gray took office. Cummings completed his role before the appointment, and Gray never met him. The only allegation bearing the slightest poten-

tial damage to Gray's claim of good faith was that of his attendance at a luncheon meeting with Jones before the discharge. Cole asserts that as this meeting took place on April 24th and he was suspended by Gray on the 25th, he must have been the subject of the conversation. That amounts, of course, to mere speculation. Gray testified that he wanted general information and did not discuss specifics with regard to any individual.

The evidence does not support any theory that Gray was party to a scheme to railroad Cole out of office, or even that he was unfairly receptive to Jones' view of the charges. There is certainly no showing beyond mere allegation that Gray knowingly received and acted on false information. The evidence tends to show instead that Gray was simply attempting to compile a broad body of information upon which the decision officially entrusted to him could be made. It would have been strange indeed to avoid consultation with the legislators who spearheaded a previous

committee investigation. Gray then acted pursuant to his authority under Section 36-26-27, Code of Alabama, 1975, and Section 2 of Rule XIII of the rules of the State Personnel Board by instituting proceedings to terminate Cole's employment with the State of Alabama, advising him that he could within ten days request an investigation by the State Personnel Board. In rquesting that Cole's federal recognition be withdrawn, Gray acted within the authority imposed upon him by National Guard Regulation 635-101.

> In Scheuer, the Supreme Court noted: It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with a good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. 416 U.S. 232 at 247, 94 S.Ct. 1683 at 1692, 40 L.Ed.2d 90 at 103.

It is manifestly apparent that Gray is protected by this concept.

[2] With regard to Cummings, the court found both investigation and report to have been conducted according to orders and within the scope of official authority. We find no evidence to even hint at an opposite conclusion. It is manifestly apparent that his actions were taken in good faith, within the scope of his discretion and the responsibilities of his office. The district court noted that "Cummings reported the good and the bad about Colonel Cole and made no recommendation that Cole be disciplined while recommending discipline for several other officers who apparently were more involved than Cole." Cummings' actions were clearly within the range of the Scheuer immunity, and the district court was eminently correct in granting summary judgment for him.

We are thus in agreement with the disposition of this suit as to the executive defendants. We do not indicate approval or disapproval of their actions, but simply find them to have been within the potentially protected

realm of official capacity, free of the corrosive effects of bad faith. Those few shreds of evidence which are said to indicate bad faith, such as contact with Jones and Holmes, show no more than an inattention to the political nuances of outward appearances.

[3, 4] The legislative defendants do not have such smooth sailing on their claims to immunity. Both argued below that their public and private statements concerning Cole were immunized from suit by the Speech and Debate Clause, U.S.Const. Art. I, § 6, Cl. 1. The district court apparently accepted the potential applicability of such a privilege to them, for it cited Hutchinson v. Proxmire, 579 F.2d 1027 (7 Cir. 1978), rev'd. 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), for the proposition that "immunity does not attach to the improper dissemination of defamatory information outside of the legislative process." Accordingly, statements and activities occurring after the dissolution of the committe were held unprotected.

We find reliance on the Speech or Debate Clause to be misplaced. Hutchinson v. Proxmire involved a United States senator, not a state legislator. By its recent decision in United States v. Gillock, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), the Supreme Court has unequivocally ruled that the embrace of the clause does not extend to a state legislator. The Court reaffirmed, however, its holding in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that members of a state legislature are potentially immune from suits for the alleged violation of civil rights under §§1983 and 1985, on the theory that a common law absolute immunity from suit survived the passage of the Civil Rights Act of 1871.

The Tenney immunity is only absolute within its scope, however, and coverage of Jones and Holmes is limited by the same considerations articulated in Hutchinson. It extends only to acts done "within the sphere of legitimate legislative activity." Tenney, 341

U.S. 367 at 376, 71 S.Ct. 783 at 788, 95 L.Ed. 1019 at 1027. In Tenney, the Court rejected an argument that the California senate's fact-finding committee on un-American activities had exceeded this scope: "to find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the judiciary or the executive." 341 U.S. 367 at 378, 71 S.Ct. 783 at 789, 95 L.Ed. 1019 at 1028.

Thus, we must conclude that the actions of Jones and Holmes taken during the pendency of the committee were protected by this rationale. We find those actions and statements, occurring after the committee dissolved to be outside its coverage. After the specific investigatory mandate expired, the reasoning of Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) becomes applicable by analogy: "[M]embers of Congress are constantly in touch with the executive branch of the government and with administra-

tive agencies... They may cajole and exhort with respect to the administration of a federal statute--but such conduct, though generally done, is not protected legislative activity." 408 U.S. 606 at 625, 92 S.Ct. 2614 at 2627, 33 L.Ed.2d 583 at 602.

As best we can construe them, Cole's allegations as to the defendants' actions after the committee's dissolution are (1) that by their comments, they defamed Cole and deprived him of his good name, and (2) that in conspiracy with Gray and Cummings, they acted to deprive him of his position without due process of law, effecting a denial of equal protection.

[5] Insofar as the complaint alleged an injury by defamation alone, referring to negative public statements made by the defendants, the district court was correct in finding no cause of action under the Civil Rights Acts. The Supreme Court established in Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976) that the loss of a good name, as

destroyed by defamation on the part of a public official, is not a "liberty or property interest" for which these statutes provide protection.

[6] We are left with the portion of the complaint alleging a conspiracy to deprive Cole of his position. The complaint was cast in terms of conspiracy by necessity, as under § 1985, a finding of conspiracy is legally required, and under § 1983, the circumstances of this case rendfer it factually required; Gray did the firing, so Jones and Holmes can only have participated by conspiracy with him.

As we noted in discussing Gray's claim to immunity, the evidence does not nearly support a theory of conspiracy between Gray and the legislative defendants. Cole has shown a possible motive of personal animosity on the part of Jones, but there is not an iota of substantiation for his allegation that he was fired in retaliation for utterances protected by the First Amendment. He has shown minimal contact between the executive and legislative defen-

dants, with no buttressing proof of the actual nature of the information conveyed. No proof of the making or accepting of statements known to be false exists in the record. Finally, there is the discharge itself. These elements, murky allegations as to motive plus mere contact plus the fact of discharge are linked together by speculation and conclusory allegations. The evidence was wholly insufficient to raise a fact issue for trial on the conspirarcy complaint.

There is nothing left of Colonel Cole's complaints. We close with the observation that the Civil Rights Acts on which this suit was predicated do not make the federal district court a forum for the litigation of every controversy surrounding the loss of property interests through state action. In this instance, the political and governmental processes involved worked to investigate and resolve the allegations against Cole and, after the prescribed procedures had run their course, to restore him to his position. There

is no reason and no room for involvement on the part of a federal court.

For these reasons, that portion of the judgment of the district court dismissing the claim against Gray and Cummings is AFFIRMED, and that portion related to Jones and Holmes is REVERSED and REMANDED with instructions that the remainder of the complaint be dismissed.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1692

U.S. COURT OF APPEALS
FILED

MAR 31 1981

GILBERT F. GANUCHEAU
CLERK

WILLIAM R. COLE,

Plaintiff-Appellee-
Cross Appellant,

versus

HENRY B. GRAY, III, Etc., ET AL.,

Defendants-Cross
Appellees,

FRED R. JONES, individually and
as State Senator and ALVIN HOLMES,
Etc.,

Defendants-Appellees-
Cross Appellees.

- - - - -

Appeals from the United States District Court
for the Middle District of Alabama

- - - - -

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 2, 1981, 5 Cir., 197_, _____F.2d_____).

(MAR 31 1981)

Before VANCE and GARZA, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service no having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND
LOCAL RULE 17 FOR STAY
OF THE MANDATE

*District Judge of the Northern District of Alabama sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1692

D. C. Docket No. 78-83-N-Civ

FILED

APR 30 11:42 AM 1981
JANE P. GORDON, CLERK
U.S. DISTRICT COURT
MIDDLE DISTRICT OF ALA.

DEPUTY CLERK

WILLIAM R. COLE,

Plaintiff-Appellee
Cross Appellant,

versus

HENRY B. GRAY, III, ETC., ET AL.,
Defendants, Cross
Appellees,

FRED R. JONES, individually
and as State Senator and ALVIN
HOLMES, ETC.,

Defendants-Appellants
Cross Appellees.

Appeals from the United States District Court
for the Middle District of Alabama

Before VANCE and GARZA, Circuit Judges
and ALLGOOD, *District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause by, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded with instructions to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the defendants-appellants pay to the plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

March 2, 1981

ISSUED AS MANDATE: APR 29 1981

A True Copy
Attested:
Clerk, U.S. Court of Appeals, Fifth Circuit

By: s/s Brenda Hauck
Deputy Clerk
Atlanta, Ga.

APR 29 1981

*District Judge of the Northern District of Alabama sitting by designation.

UNITED STATES CONSTITUTION, FIRST AMENDMENT:

> "Congress shall make no law... abridging the freedom of speech...."

UNITED STATES CONSTITUTION, FIFTH AMENDMENT:

> "No person shall...be deprived of life, liberty, or property without due process of law...."

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT:

> "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1985(3):

"If two or more persons in any State or territory, conspire...for the purpose of depriving, either dirctly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws,...in case of conspiracy set forth in this section, if one or mor persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

ARMY REGULATION 20-1, 25 OCTOBER 1974, CHAPTER 4, ¶4-2:

4-2 Responsibilities of Inspector General.

Inspectors General will collect and examine all available evidence per-

tinent to the matter under investigation or inquiry, and they will make a complete and impartial presentation thereof. Inquiries or investigations initiated as a result of an Inspector General action request will address each allegation in sufficient detail to either substantiate or refute it or, if sufficient evidence is not available, to so indicate. Allegations will not be ignored because they appear to be unimportant, impertinent, irrelevant, or subsequently withdrawn by the complainant. In their reports, Inspectors General will discuss the evidence presented and will reach conclusions and make recommendations based upon available evidence. They have no power to make legal findings or impose punishment. They will make every effort to insure that no injustice is done in conducting and reporting on investigations and inquiries they make. Inspectors General and other individuals with knowledge of Inspector General investigations and inquiries will refrain from unofficial discussion and comment upon such investigations.

DEPARTMENT OF THE ARMY TECHNICAL BULLETIN, TB-IG4, INSPECTOR GENERAL GUIDANCE MATERIAL, AUGUST 1967:

Section 1, ¶14

14. Qualifications of an Investigating Officer. An investigating officer must be impartial, unprejudiced, tactful, and without bias.

His investigation must be made with an open mind and without any preconceived opinions as to the truth of falsity of the matters at issue. Some of the personal qualities which an investigating officer must possess are listed below.

a. The investigating officer must be self-confident and self-reliant. The successful investigating officer attains his ends by the adroit interrogation of witnesses and handling other matters connected with the case. He also must be firm, always bearing in mind that he represents the directing authority.

b. It is essential that the investigating officer be dignified in his relations with both military and civilian personnel. The office who, by lack of dignity or by carelessness in conduct or appearance, exhibits an indifference to his mission, cannot expect to command the respect of others.

Section 1, ¶15:

15. Responsibilities of an Investigating Officer. a. The investigating officer has a dual responsibility. He is responsible to the directing authority and must be diligent to protect and further the interests of the Government. He is likewise responsible to the persons who are under investigation. Their rights must be scrupulously observed. The investigating officer must make sure that not even a sem-

blance of injustice is attributable to his own carelessness or neglect.

b. The investigating officer is a fact finder. The directing authority will base his decisions and his actions upon the facts presented to him; therefore, the investigating officer must thoroughly investigate the facts bearing upon a given situation and make an accurate , complete, and impartial report. He does not conduct a trial and he must not assume that a directive for investigation indicates either the guilt or innocence of the persons involved, or that an allegation necessarily indicates wrong-doing.

Section V, ¶41(b):

b. Importance.

(1) The investigating officer must realize that the report of investigation is an important document which requires great care in its preparation. The report is important because it usually affects the future of the person under investigation, or it may result in a change of policy. If it concerns a person's future, this alone demands that it be impartial and complete. When it affects a policy, it must be accurate and dependable. In any event, it must present the facts to the commander so that he can take whatever action may be necessary.

(2) An investigation does not necessarily sustain the charges of allegations upon which it was based. Frequently, such charges and allega-

tions are untrue. In such cases, the obligation to disprove charges is as great as the obligation to prove them when they are true. The report of investigation must reflect all ascertainable facts, and must be accurate, reliable, and impartial.

(3) The requirements of a report of investigation, in addition to those set forth above, are--

(a) It must be intelligible;
(b) The subject matter must be systematically arranged;
(c) The statements and references must be correct.

Office-Supreme Court, U.S.
FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

CASE NO. 80-2218

IN THE
SUPREME COURT OF THE UNITED STATES
1980-81 TERM

WILLIAM R. COLE,

PETITIONER-PLAINTIFF

VS.

HENRY B. GRAY, III, FRANCIS J. CUMMINGS, FRED R. JONES and ALVIN HOLMES, EACH INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITY,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT ALVIN HOLMES IN OPPOSITION

WILLIAM B. MOORE
Post Office Box 270
Montgomery, Alabama 36101
834-8480

SARAH M. GREENHAW
Post Office Box 651
Montgomery, Alabama 36101
262-1457

ATTORNEYS OF RECORD

QUESTIONS PRESENTED FOR REVIEW

1. Is there an issue of fact for trial on a conspiracy complaint where the evidence conclusively shows that the facts relied upon to support allegations of conspiracy are not susceptable of an interpretation that might give rise to an inference of conspiracy?
2. Is a state legislator's conduct protected under the doctrine of legislative immunity where he is acting within the sphere of legitimate legislative activity?
3. Do alleged defamatory remarks constitute a deprivation of rights under the Fourteenth Amendment.
4. Should summary judgment be entered in favor of the moving party where the record is fully developed and there is no genuine issue of material fact and he is entitled to judgment as a matter of law.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding in the United States Court of Appeals for the Fifth Circuit were as follows:

William R. Cole, plaintiff-appellee-cross-appellant; Fred R. Jones, defendant-appellant-cross-appellee; Alvin Holmes; defendant-appellant-cross-appellee; Henry B. Gray, III, defendant-appellee and Francis J. Cummings, defendant-appellee.

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2. Where a state legislator is acting within the sphere of legitimate legislative activity his conduct is protected under the doctrine of legislative immunity 25

3. Alleged defamatory remarks do not constitute a deprivation of rights secured under the Fourteenth Amendment 29

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REPORT OF OPINION BELOW

Respondent Alvin Holmes accepts petitioner's statement of Reference to Report Of Opinions as being correct.

JURISDICTION

Respondent Alvin Holmes accepts petitioner's statement of Jurisdictional Grounds as being correct.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondent Alvin Holmes accepts petitioner's citation of these provisions as being correct.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. Sections 1983 and 1985 wherein plaintiff William R. Cole alleged that

defendant Alvin Holmes conspired and acted individually in an attempt to deprive him of his State merit system position in the State Military Department by making defamatory statements which stigmatized his good name and reputation and which resulted in an attempt to have his employment terminated. Cole sought compensatory damages in the amount of $4,000,000.00, punitive damages in the amount of $4,000,000.00 and injunctive relief. (R. pp. 104-122)

Other defendants named in the suit were Adjutant General Henry B. Gray, State Senator Fred R. Jones and Major Francis J. Cummings, Inspector General Investigating Officer in the United States Army. (R. pp. 2-3)

Holmes was at all times relevant hereto a member of the Alabama House of Representatives. In October of 1975 the Alabama Legislature passed a resolution creating a Joint Interim Committee (hereinafter referred to as Committee) to investigate the use of federal monies received by State agencies. Holmes along with two other Representatives and three Senators, including Defendant Jones, was appointed to serve on the Committee. (R.p. 145)

The Committee sought and received information concerning the use of federal money from the State departments and agencies, including the Military Department. While the Committee was conducting its investigation it became aware of certain irregularities in the Military Department which involved among other matters extra duty pay for recruiting and retention activities of officers. (R. pp. 145, 146) Some of the other charges of irregularities in the

Alabama National Guard included alleged misuse of National Guard helicopters for the private benefit of friends of then Adjutant General Rollo, alleged misuse of National Guard canteen funds and State cars by National Guard officers, conflicts of interest in National Guard purchases, and excessive and improper expenditures of National Guard funds for dinners for high ranking National Guard officers. (R. 604) Cole held the merit system position of Military Executive officer in the Military Department and was primarily in charge of personnel and administration. He was also a Colonel in the Alabama Army National Guard. (R.p. 4) Cole was one of several officers in the Military hierarchy who received federal extra duty pay which included extra pay for recruiting and retention activities, in addition to his state salary. (R. pp. 302, 306, 307)

Some of the evidence before the Committee reflected that in 1975 Colonel Cole

received $22,000.00 in state pay and $17,532.00 in federal pay for 166 extra duty days. Then Adjutant General Charles Rollo received $25,000.00 in state pay and $22,000.00 in federal pay for 171 days of active duty. Other officers who received large sums of federal pay for extra duty days included Colonel Speigner, Major Hathorn and Colonel Hora. (R. pp. 305-308) There was also testimony before the Committee that officers receiving federal pay claimed to have worked on weekends, Sundays, holidays, Christmas, the Fourth of July, Labor Day and Thanksgiving. (R. pp. 440, 571, 587) The hearings before the Committee were open to the public and widely reported in the press throughout the State. (R. pp. 148, 302, 444-448, 534-536, 604-612)

Both General Rollo and Cole were among the witnesses who testified before the Committee. When Cole testified before the Committee Representative Cates, another member of the Committee, did most of the

questioning and it was Cates who Cole said "browbeat" him during his testimony. (Cole depo. 542) During the course of the hearings it was reported that Holmes made the following statement: "Personally I don't believe you all worked all those days." (R. pp. 440, 444)

During the time the Committee was conducting its investigation Adjutant General Charles Rollo in March of 1976 requested that First Army also conduct an investigation into the recruiting and retention practices. Defendant Francis J. Cummings was one of the officers assigned to conduct the investigation. After Cummings' arrival in Montgomery the Committee extended an invitation to him to meet with the Committee. (R. p. 146)

The Committee had a short meeting at the State Capitol in the Committee room with Cummings and Major Holmes [1/] who was also

1/ Major Holmes' name is mentioned several times in the record and should not be confused with Defendant Alvin Holmes.

assigned by First Army to the federal investigation. The Committee advised the officers generally as to information the Committee had obtained, offered to cooperate with the federal investigation and asked that a thorough investigation be made. However, Cummings and Major Holmes never sought the Committee's assistance. (R. 146, 572)

Cole's name was not mentioned or discussed during the meeting with Cummings and the only matter Representative Holmes mentioned at the meeting was related to hiring practices in the Military Department. This was Holmes' only contact with Cummings and he never saw or talked to him again. Cole admitted he had no evidence that Holmes furnished Cummings any information and he believed Holmes' testimony that the only thing he mentioned at the Committee meeting concerned the hiring of minorities. (R.p. 147)

Cole acknowledged that Holmes' inquiry about hiring minorities would not constitute a conspiracy between Holmes and Cummings. Cole stated that his evidence of a conspiracy between Holmes and Cummings consisted of the meeting Cummings had with the Committee and the fact that he was subsequently suspended and dismissed. The suspension and dismissal action occurred more than a year after Cummings met with the Committee. (Cole's depo. pp. 544-545)

A Report of Inquiry (hereinafter referred to as ROI) was filed several months later by Cummings in September of 1976. It was a voluminous report of several hundred pages and exhibits and was reviewed and endorsed by the Inspector General of First United States Army and the Commanding General of First United States Army. The ROI among other things concluded that serious misconduct and improprieties had been committed in connection with the Recruiting and Retention program and recommended various corrective and disciplinary

action. (Exhibit 1 to Gray's Verified Answer R. pp. 27-31 and R. p. 147)

In addition, during the same time period, another group of federal investigators conducted an independent investigation and found that there was abuse in the Recruiting and Retention program. The Alabama Senate Budget Committee, of which Holmes was not a member, was also critical of the active duty pay received by high ranking Military Department employees and recommended a limitation on active duty days. (R. pp. 592, 593) And Governor Wallace ordered that it be stopped. (Cole depo. p. 500) The Office of the Examiner of Public Accounts was also critical of the National Guard administration in Alabama. (R. 604)

Newspapers throughout the State reported and were critical of high ranking officers receiving both state and federal pay and the practice was often referred to as "double dipping." (R. pp. 444-448, 534-536, 604-612)

After the ROI was received by Governor Wallace he requested the resignation of General Rollo and Henry Gray was appointed to succeed Rollo on or about March 24, 1977. General Gray decided to suspend Cole pending his own investigation. Gray then reviewed the ROI and conducted his own independent investigation which was the basis of hi decision to dismiss Cole. (R. pp. 147, 303, 304, Gray depo. 66-63, 298) Holmes and Gray never discussed Cole and Holmes never suggested or recommended that Cole be dismissed or suspended. (R. p. 147) <u>There has been no evidence that Holmes had any input on the decision to suspend or dismiss Cole</u>. Cole admitted that he had no evidence of any contacts or meetings between Gray and Holmes. (Cole depo. 559) Cole further testified that the only evidence he had that Holmes sought to suspend and dismiss him is that Jones called Holmes to invite him to go to lunch with Gray and Representative Cates, which luncheon Holmes did not

attend. (Cole depo. 548, 557-559) In addition, Cole testified that the basis and evidence of the alleged conspiracy between Gray and Holmes was that same luncheon meeting which Holmes did not attend. (Cole depo. 565-566)

Cole appealed his dismissal by General Gray to the State Personnel Board. After a lengthy hearing, the Board in July of 1977 ordered his reinstated but denied him thirty days of salary in addition to the thirty-day loss of salary imposed by General Gray at the time of his suspension. The Board, although ordering Colonel Cole reinstated with said thirty-day additional loss of pay, was also critical of the practice which permitted Colonel Cole and other high ranking officers to serve as much time on extra duty as Colonel Cole had. (R. pp. 63-65)

Shortly before the Personnel Board entered its order reinstating Cole, it appeared in the newspapers that Cole was going to be

reinstated. Holmes read about it in the newspapers and called Stanley Frazer, Director of the State Personnel Department, and asked who he should contact in order to appear before the Personnel Board and he also asked if Cole was going to be reinstated to his position as personnel officer. Holmes was informed that Dr. Ralph Adams was the person to contact about appearing before the Board and that Frazer had nothing to do with Cole getting his job back. However, Holmes never contacted Dr. Adams and did not appear before the Personnel Board. (Holmes' depo. pp. 45-49, R. p. 155-156)

Holmes was concerned about Cole resuming his duties as personnel officer because he did not think Cole was fair about the hiring of minorities. Holmes did not think enough blacks had been hired. He felt very strongly about this and talked also to Rollo about it. He thought public money should be used for blacks as well as anyone else, and that

blacks had the right to hold jobs. Holmes said the Military Department was the only State department where the only blacks working were in positions of maids and janitors. (Holmes' depo. pp. 45-49, Rp. 115-156)

With regard to the number of blacks in the National Guard and Military Department, Cole testified that there were between 1,500 and 2,000 recruiters in the National Guard and out of that number nine were black and Cole had advised Holmes of this number. In the Military Department there were five blacks working throughout the State, all of whom were custodial workers or laborers. Later one black clerical worker with a degree from AUM was hired to work in the mailroom and two other blacks were subsequently hired for the mailroom. (Cole depo. 572, 575-577)

After it was carried in the newspapers that Cole was going to be reinstated, it was reported in the press that Holmes was

opposed to the Personnel Board returning him to his job as personnel chief. Holmes was quoted as calling Cole the "most notarious racist out there." (R.p. 445)

While Cole's case was before the Personnel Board Gray wrote First Army and requested that Cole's federal recognition be withdrawn. Colonel James Stevenson prepared Gray's letter requesting the withdrawal of Cole's federal recognition and Gray relied on Colonel Stevenson and Colonel Roberts to prepare the charges. The matter of federal recognition was strictly an Army matter. (Gray's depo., pp. 136, 140, 163) Holmes did not even know Cole had federal recognition. It was Holmes' impression that Cole was a State employee and did not have federal recognition. (Holmes' depo. p. 32, R. p. 441)

Later that year in November of 1977, Speigner, Hathorn and Hora were reinstated to their military positions. During the

Committee hearings evidence had been presented that these three officers had received substantial federal pay for active duty days in addition to their regular salary. There was also evidence that Hawthorn operated a novelty company which sold recruiting and retention-type products to the National Guard. Furthermore, the ROI had been sharply critical of some of the activities of these officers. After it appeared in the papers that the officers were to be reinstated Holmes called Gray and asked him who ordered the reinstatement and Gray told him that the Governor had ordered it. (Gray's depo. 183-185; Holmes' depo. 53-54)

Regarding the reinstatements of Speigner, Hora and Hathorn, Holmes made the following statement on television:

> I am surprised that those individuals were not indicted by the Federal Grand Jury, and I'm surprised that they are not now serving in the

> federal penitentiary as they should be, and the Governor of this state gives an order to the State Adjutant General to reinstate these individuals. In my opinion Governor Wallace should be ashamed and he should hold his head in disgrace, and I don't like it, I resent it. I have made a request to the Secretary of the Army, Cliff Alexander, for an appointment.
>
> I'm gonna go to Washington to sit down with Mr. Alexander, the Secretary of the Army, in regards to the possibility of getting those individuals' federal recognition taken. It is obvious that Governor Wallace, the Commander In Chief of the Alabama National Guard, is not gonna do anything about the corruption in this-uh-state that exists with the Alabama National Guard.

(R. pp. 441, 447) The newspapers at this time also carried a similar report which stated:

> Holmes said he had asked for an appointment with Secretary of the Army Clifford Alexander to request that federal recognition to the reinstated officers be lifted.
>
> Holmes called the officers "some of the most corrupt individuals in my opinion, who have ever served in

> public office." He also said the governor "should be ashamed and should hold his head in disgrace" for ordering the reinstatements.
>
> Certain politicians who are friends of the officers "brought political pressure on the governor" for the reinstatement, Holmes said.
>
> "Wallace says he's for law and order but he's not for putting white collar criminals behind bars," said the black legislator. "If the officers had been black, they would have been indicted and convicted."
>
> In addition to traveling to Washington,D.C., to confer with Alexander, Holmes said he would consult the legislative committee chairman, Sen. Fred Jones of Montgomery, to see if anything could be done.
>
> "Each one of them lied when they came before the committee" said Holmes of the four National Guard officers.

(R. p. 446)

Holmes testified that he could not be and was not referring to Cole in these statements as Cole had been reinstated long before this time and had his job back. (Holmes' depo. 59, 79)

In December of 1977 Major Hathorn had a hearing on the withdrawal of his federal recognition. During the Hathorn hearing public statements had been made which were critical of the Committee's investigation. Because of the criticism Jones, Holmes and Representative Cates had a press conference at the State Capitol to explain the role of the Committee and it was reported in the press. (R. p. 441, 448)

The board who heard Hathorn's case failed to recommend withdrawal of his federal recognition and Holmes is quoted in the newspapers at that time as saying in regard to the Hathorn case:

> "the guy is guilty. Everybody who looks at the inspector general's report knows he's guilty. He should be punished." (R.p. 450)

With regard to Holmes' contacts with Jones they consisted of discussion of the military situation in Committee at the State Capitol and they both attended the press

conference in December of 1977. Jones apparently called Holmes and asked him to have lunch with Gray and others but Holmes does not even recall the invitation. In addition, although Holmes was aware of Jones' promotion to Brigadier General in the National Guard they never discussed it or Jones' relationship with Rollo. (R.p. 147, Holmes depo. pp. 12-14)

Cole admitted that the only evidence he had of a conspiracy between Jones and Holmes were the newspaper articles about the Committee meetings and "continuous outpouring of information from the Committee." (Cole depo. pp. 566-569)

Finally, it should be noted that Holmes fully supported a strong military and National Guard and felt that the National Guard should not only be strong in numbers but also in equipment. Holmes served voluntarily in the military for two years. (Holmes' depo. 44, 89)

Holmes also felt very strongly that anyone who did wrong, whether he be a General, Colonel or private, should be punished. And although his position of wrongdoing in the Military Department obviously differs with Cole's, Holmes testified that the Committee showed that individuals who came under investigations by the Committee had done things they should not have done and he felt they should have been given some kind of punishment. (Holmes' depo. 31, 34, 44, 70, 76-79) Holmes was simply trying to carry out his legislative duties while participating in the Committee investigations. (Holmes' depo. 44, 78)

ARGUMENT

1. Where the evidence conclusively shows that the facts relied upon to support allegations of conspiracy are not susceptable of an interpretation that might give rise to an inference of conspiracy there is no issue of fact for trial on the conspiracy complaint.

Petitioner's first contention concerns the court of appeals holding that there was insufficient evidence to raise a factual issue regarding the conspiracy aspect of the case. The court of appeals characterized these statements of conspiracy as "murky allegations * * * linked together by speculation and conclusory allegations." A review of the evidence, or rather the lack of evidence, presented to support the conspiracy claim fully supports the lower court's decision that there was no conspiracy.

In Adickes v. Kress and Company, 398 U.S. 144 (1970), this court held that in order to meet the burden of showing the absense of genuine issue of fact one must "show conclusively that a fact alleged by petitioner was 'not acceptable' of an interpretation that might give rise to an inference of conspiracy."

A review of the evidence clearly demonstrates

that Holmes has met this burden. The record shows that the allegations of conspiracy between Holmes and Cummings rest solely upon the fact that they both attended a meeting of the legislative committee. The evidence was that Holmes did not furnish Cummings any information at the committee meeting and that he never saw, talked, or contacted Cummings again. Even Cole acknowledged that the brief encounter Cummings and Holmes had at the committee meeting would not constitute a conspiracy. Cole also testified he believed Holms when he (Holmes) said that the only matter he mentioned during that committee meeting concerned the lack of hiring of minorities in the Military Department.

With regard to Jones, Cole admitted that the only evidence he had of a conspiracy between him and Holmes were the legislative committee meetings and newspaper articles about the Committee's investigation. There was no evidence of any contacts between them outside of committee meetings except for one invitation to lunch by Jones to Holmes,which was declined, and a joint press conference held by Jones, Holmes and Representative Cates months after Cole was reinstated to

explain the Committee's role in the investigation.

This leaves the allegations of a conspiracy between Holmes and Gray. Very little can be said as there was absolutely no evidence of a conspiracy between them. Their only contact was several months after Cole had been reinstated and it consisted simply of a telephone inquiry from Holmes to Gray about who ordered three other officers reinstated. Cole attempted to imply a conspiracy between Gray and Holmes based on evidence that Jones invited Holmes to have lunch with him and Gray. But there was no evidence that it was anything more than just that --- an invitation to have lunch, which Holmes does not even recall, and a luncheon he did not attend. Furthermore, the evidence was without conflict that Holmes had no imput whatsoever in Gray's decision to suspend or dismiss Cole.

Based on the evidentiary matter presented, respondent Holmes has certainly met the burden of foreclosing the possibility of a conspiracy. Considering the facts alleged and evidence presented, the record does not support any inference of a conspiracy but, instead, supports the decision of the court of appeals that there was insufficient evidence of a

conspiracy for trial.

The same could also be applied to the 1985 claim. In order to state a claim under 42 USC § 1985(3) there must be a showing of "some racial, or perhaps otherwise class based invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88 (1971).

The only thing the complaint here alleges with regard to any class is it refers to "the class of officers and enlisted persons of the Alabama National Guard whose political and public administration beliefs were similar to those of plaintiff", such beliefs being a strong National Guard. Petitioner's attempt to say that Holmes discriminated against those who believed in a strong National Guard is certainly not supported by the evidence. The record shows that Holmes not only believed and fully supported a strong National Guard and military, but he volunteered to serve and did serve honorably for two years in the military. Thus, there was no evidence of any class-based animus on the part of Holmes and no conspiracy in violation of § 1985(3).

Furthermore, to establish the intent to conspire,

knowledge of the conspiracy must be clear and not equivocal. Ingram v. United States, 360 U.S. 672 (1959). This court in Ingram also held that "charges of conspiracy are not to be made out by piling inference upon inference." Although Ingram was a criminal case, the same would be equally applicable to this case, and it clearly appears that such tactics were used here to allege a conspiracy.

Based on the foregoing authorities and evidence the decision of the court of appeals is correct as it conclusively appears that there is no inference of a conspiracy and, therefore, no factual issue for trial on the conspiracy complaint.

2. Where a state legislator is acting within the sphere of legitimate legislative activity his conduct is protected under the doctrine of legislative immunity.

The Fifth Circuit held that actions and statements by Holmes and Jones which occurred during the pendency of the legislative committee were protected by the doctrine of legislative immunity. Even petitioner concedes that statements made by them during the hearings were protected, but then petitioner

attempts to show that their "conduct" was not so protected.

It is most important to point out that petitioner fails to specify with any particularity the conduct or contacts by Holmes that were supposedly outside the realm of protected activity. Rather, petitioner simply by generalized, misleading,innuendo characterizes Holmes conduct as "cajoling" the executive branch. But the evidence does not support petitioner's position.

What the evidence does show is that there was no conduct or activity by Holmes that could by any stretch of the imagination be termed as cajoling or exhorting with a member of the executive branch. The evidence, as previously stated, shows that Holmes single contact with Cummings was at a committee meeting and the only thing Holmes mentioned was the hiring of minorities in the Military Department.

Analysing the activity of Holmes engaged in during the pendency of the committee there was no conduct that would fall under the prohibited conduct such as enunciated in Gravel v. United States, 408 U.S. 606 (1972). Rather, just as the Court of Appeals found,

Holmes conduct as described would come within the protection of Tenny v. Brandhove, 341 U.S. 367 (1951).

In Tenny, defendants were member of the California Legislature and also a legislative committee constituted by a resolution. The Committee asked local officials to institute criminal proceedings against plaintiff and the chairman of the committee read into the record a statement concerning an alleged criminal record of plaintiff. He then sued the members of the committee alleging that the committee hearing was not held for legislative purposes but was designed to prevent him from exercising his rights of free speech and to petition the Legislature and to deprive him of due process of the law. The District Court dismissed the action.

This court affirmed the judgment and held defendants were acting in a field where legislators traditionally have power to act and that they were not liable under the Civil Rights Act. This court stated in part:

> Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion,

> dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. (95 L. Ed. at pages 1027-1028)

It was further held that the claim of unworthy purpose does not destroy legislative immunity and that courts should not inquire into the motives of legislators. It was also noted that it is the duty of the Legislature to look diligently into every affair of government and to talk about what it sees. And the informing function of a representative body should be preferred even to its legislative function.

Applying the foregoing authorities to the case here the court of appeals correctly held that Holmes' conduct or statements made during the course of legislative committee activity were protected and he would be absolutely immune from suit for such conduct.

3. Alleged defamatory remarks do not constitute a deprivation of rights secured under the Fourteenth Amendment.

Cole also claims deprivation of a liberty interest as secured by the Fourteenth Amendment by alleging that he has been stigmatized and defamed by statements of Holmes. However, this type of claim has been held not to support a § 1983 action.

In Paul v. Davis, 424 U.S. 693 (1976), this court addressed the issue of stigmatization of one's reputation. It was held that the infliction of a stigma on one's reputation, without more, is not a deprivation of one's liberty or property interest within the meaning of the Fourteenth Amendment. In so holding, this court stated in part:

> But the Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment. (Emphasis supplied)
>
> * * * * * *
>
> While Roth recognize that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation

> perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment . . . . (424 U.S. at 706-709)

More recently, in the case of Baker v. McCollan, 443 U.S. 137 (1979), it was held that "The Fourteenth Amendment does not protect against all deprivation of liberty. It protects only against deprivations accomplished without due process of law." In Baker, this court, while addressing the issue of whether an official's conduct was unconstitutional, went on to say:

> For as the Court of Appeals recognized, a public official is liable under § 1983 only "if he causes the plaintiff to be subjected to deprivation of his constitutional rights." (emphasis in original)

In the case here, petitioner's allegations of deprivations of a liberty interest as related to any statements made by Holmes are totally conclusory and have no basis in fact. The statements most strongly urged by Cole to be defamatory must be considered in light of the time and circumstances when they were made. Basically, the statements attributed to Holmes took place in November and December of 1977. This was after Governor Wallace had ordered the reinstatements of Speigner, Hora and Hawthorne. Cole had been

reinstated by the Personnel Board several months prior. There was no reference to Cole in any of these statements. The statements in no way led to or contributed to any personnel or adverse action against Cole. In fact, Cole retained his employment.

The evidence shows that not only did Cole retain his employment but that he retained his federal recognition and that he was afforded full procedural due process. Nor was there a denial of substantive due process. The record shows that the Personnel Board did not absolve Cole of wrong doing and found that Gray could properly assess disciplinary action against Cole for his abuse of the rules and regulations.

Under the principals enunciated in Paul and Baker, inasmuch as Cole has not been deprived of protected liberty or property interest, has not been denied due process of the law, and Holmes has not caused Cole to be deprived of his constitutional rights, neither Holmes' actions or statements are actionable under § 1983.

4. Where the record is fully developed and there is no genuine issue of material fact and one is entitled to judgment as a matter of law, summary judgment should be entered in favor of the moving party.

Summary judgment in favor of respondent is particularly appropriate here as not only is there no genuine issue as to any material fact but respondent has established that no conspiracy existed, that there was no deprivation or a protected liberty or property interest, and that any action by Holmes during the pendency of the legislative committee was protected. Furthermore, there is no question but that Holmes was also protected under the doctrine of qualified immunity.

In Scheur v. Rhodes, 416 U.S. 232 (1974), it was held that public officials are entitled to a qualified immunity if they had "reasonable grounds for the belief formed at the time and in light of all the circumstances" and acted with a good faith belief, then they are immune from liability for damages arising out of their official conduct.

And in the instant case, the record is replete with evidence showing that Holmes acted in good faith just as the other defendants did. To briefly summarize,

the evidence shows that during the course of the legislative committee's investigation of irregularities in the National Guard it was learned that Cole, among other high ranking officers, had received substantial federal extra duty pay in addition to his State salary. There was also evidence of misuse of helicopters, canteen funds, State cars, improper expenditures of funds for dinners, conflict of interest in purchases, and that officers claimed to have worked on weekends, Sundays and all major holidays. (R. pp. 145, 146, 306, 604). In addition, other government entities investigated these matters and were critical of certain practices. Governor Wallace also ordered that the practice of receiving both federal and state pay for certain activities be stopped (R. pp. 592, 593, 604).

Holmes strongly believed that there was wrongdoing in the Military Department and it was his position that the Committee's investigation showed that the individuals had done things they should not have and that they should be given some type of punishment. Holmes also believed he was doing his legislative duty by participating in the Committee hearings.

It was also obvious that Holmes strongly

believed, with good reason, that Cole had not been fair about the hiring of minorities. Holmes was very concerned that the Military Department was the only State Department where blacks worked only in custodial positions (Holmes' deposition 45-49, R. pp. 115-156). Finally, during the time Holmes made his last statements there had been criticism of the Committee's investigation (R. pp. 441, 448).

Applying the standard set forth in Scheur v. Rhodes, supra, the only conclusion that can be drawn is that Holmes had reasonable grounds, at the time and under the circumstances, to believe that his actions and statements were necessary and justified and that he was performing his public duty.

In Butz v. Economou. 438 U.S. 478 (1978), this court recognized that suits based on the defense of immunity, such as the one here, can be disposed of on summary judgment. In Butz, it was stated:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial,

> but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 US, at 250, 40 L. Ed. 2d 90, 94 S.Ct. 1683, 71 Ohio Ops 2d 474. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procudure will ensure that federal officials are not harassed by frivolous lawsuits.

In the case here the record was fully developed with numerous depositions, affidavits, exhibits, documents, pleadings and briefs, all of which fully supported the granting of summary judgment in favor of Holmes. The only conclusion that can be reached based on the evidence presented here is that there was was no conspiracy, no deprivation of protected interests and that Holmes would be protected for his actions under the doctrines of legislative and qualified immunity. If civil rights suits such as the one here are permitted to be maintained because someone disagrees with a public official's strongly held convictions of public duty, then the protections and immunities given to public officials will no longer have any meaning and public officials will not only be apprehensive to discharge their duties but it could also result in terminating the independence of legislators that has always been so

highly revered and inhibit the legislative process. For the reasons stated it clearly appears that the decision of the Fifth Circuit Court of Appeals was correct.

CONCLUSION

We submit that Holmes is fully protected under the doctrines of legislative and qualified immunity for any conduct on his part. In addition, we submit the statements made by Holmes are not actionable under § 1983 and that the evidence failed to show that Cole was denied either a property or liberty interest. Finally, there was no evidence of any participation in a conspiracy by Holmes. The court of appeals was clearly correct in summary judgment and its decision and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William B. Moore, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 26th day of August, 1981, I did serve copies of this ~~petition and the accompanying appendix on Respondent~~ brief, by placing in the United States Mail, first-class postage prepaid, three copies properly addressed to the counsel of record for Respondent, as follows:

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I further certify that I have served all parties required to be served.

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CLERK

80-2218

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
1980-91 TERM

WILLIAM R. COLE,

PETITIONER-PLAINTIFF

VS.

HENRY B. GRAY, III,
FRANCIS J. CUMMINGS,
FRED R. JONES, and
ALVIN HOLMES, EACH
INDIVIDUALLY AND EACH
IN HIS OFFICIAL CAPACITY,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE OF FRED R. JONES TO

PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

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QUESTIONS PRESENTED FOR REVIEW

1. The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's claim based on defamation.
2. The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's conspiracy claim.
3. The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's First Amendment claim.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding in the United States Court of Appeals for the Fifth Circuit were as follows:

William R. Cole, plaintiff-appellee-cross-appellant; Fred R. Jones, defendant-appellant-cross-appellee; Alvin Holmes, defendant-appellant-cross-appellee; Henry B. Gray, III, defendant-appellee, and Francis J. Cummings, defendant-appellee.

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STATEMENT OF THE CASE

Defendant Jones was a member of the Alabama Senate at all times relevant to this case (R. 127). In October 1975, the House of Representatives and the Senators of the Alabama Legislature passed a resolution creating an Interim Committee to investigate the use of federal monies received by State agencies (R. 135).

The Interim Committee consisted of three Senators, including Defendant Jones, and three members of the House of Representatives, including Defendant Alvin Holmes. The Joint Interim Committee first met on November 24, 1975, and Defendant Jones was elected Chairman of the Committee.

The Committee mailed letters to dozens of State agencies and departments seeking information on federal funding and/or federal grants (R. 583). While the Committee was making its study and investigating various departments, it became aware of certain irregularities in the Military Department. Defendant Jones offered to step aside as Committee Chairman because of his connection with the Military Department, but the Committee refused to accept his offer (R. 129). One

of the matters that came to the Committee's attention concerned large sums of extra duty pay for recruiting and retention activities paid to high ranking officers in the Alabama National Guard, including Colonel Cole. For example, the following officers received in 1975 in addition to their salaries as fulltime state or federal employees, and in addition to approximately 48 days of drill pay, payment for extra duty days as shown by their names:

General Rollo (then Ad. Gen.)	171 extra duty days
Colonel Speigner	136 extra duty days
Major Hathorn	179 extra duty days
Colonel Hora	129 extra duty days
Colonel Cole	166 extra duty days

Colonel Cole was involved in the payment of these extra duty days as a recipient of the funds and as the Personnel Officer of the Alabama Military Department. The Committe was critical of this practice.[2/]

1/ This information compiled by the Department of Examiners and Public Accounts (R 571). See also R. 587.

2/ The trial court's opinion at R.685 states that a guardsman could get 4 days of drill pay for being at drill 2 days and thus he could pick up 11 days of work each week by attending drill or 458 man days a year. In this the trial court is in error; a guardsman can receive no more than credit for 4 days of drill per month or 48 drill days per year, not the number suggested by the trial court (Cole depo., R. 506, 507).

Numerous other charges of irregularities in the Alabama National Guard included misuse of National Guard helicopters for the private benefit of friends of General Rollo, misuse of National Guard canteen funds and State cars by National Guard officers, conflicts of interest in National Guard purchases, nepotism, and excessive and improper expenditure of National Guard funds for dinners for high ranking National Guard officers (R 604).

As noted in the Court of Appeals' opinion, the hearings before the Interim Committee were open to the public and were widely reported by the news media throughout the State of Alabama.

On March 9, 1976, then Adjutant General Rollo requested that the Commanding General of the First Army conduct an investigation of recruiting and retention practices of the Alabama Army National Guard. Major Cummings and Major Holmes were assigned by First Army to conduct this investigation. Defendant Jones was instructed by the Interim Committee to extend an invitation to them to meet with the Committee.

The Committee had a short meeting with Major Cummings

and Major Holmes at the State Capitol in the Committee Room and advised them generally as to the information the Committee had obtained. As Defendant Jones has stated in his affidavit, to the best of his recollection, Colonel Cole was not mentioned or discussed during this meeting of the Interim Committee. The main thrust of the meeting was to advise the federal officers that the Interim Committee desired to cooperate with the federal investigation and desired them to conduct a thorough investigation. Neither visiting officer encouraged or discouraged the Committee's offer to provide them with information the Committee had received, but subsequently they never sought or obtained this information (R 572).

This meeting was the only meeting or personal encounter between Defendant Jones and either Major Cummings or Major Holmes. Later Defendant Jones called Major Cummings on the telephone approximately four or five times. Each call was made in his official capacity as Chairman of the Interim Committee, on behalf of the Committee, pursuant to its instruction and in the presence of the Committee at the State Capitol.

Colonel Cole was never mentioned or discussed in these telephone conversations, and the information given to Major Cummings in the telephone conversations did not concern matters in which Colonel Cole was involved or connected in any way (R. 572).

Colonel Cole in his deposition taken more than six months after he filed this lawsuit conceded that he had no knowledge of any communication between Defendant Jones and either Major Cummings or Major Holmes other than the meeting when the Committee was in session at the Committee room, and the few telephone calls by Defendant Jones to Major Cummings, which calls were made at the instance of the Committee when the Committee was in session (Cole depo., p. 531-533).

The Report of Inquiry (hereinafter referred to as ROI) prepared by Major Cummings and Major Holmes was many hundreds of pages in length, and dealt with many irregularities in the National Guard (See ROI and R. 587-589). It contained over a thousand pages of exhibits. Major Cummings and Major Holmes interviewed dozens of witnesses, including Plaintiff Cole. The report was not

completed for some five and a half months. Many of the irregularities referred to in the ROI were not even known to Defendant Jones or the Interim Committee prior to the publication of the Report (R. 573). Among many other irregularities, the ROI was sharply critical of the practice and procedure under which large sums of money were annually paid to high ranking National Guard officers who were also fulltime State officials for recruiting and retention duty. The ROI was filed by Major Cummings in September 1976, and it was reviewed and concurred in by the Inspector General of the First United States Army and endorsed by the Commanding General of the First United States Army.

The ROI was furnished to Governor Wallace in September 1976, and made public in March or April, 1977. When the ROI was made public,it was widely quoted in dozens of Alabama newspapers. See, for example, article appearing in the Anniston Star, April 2, 1977 (R. 587), and an article appearing in the Birmingham Post Herald on April 2, 1977 (R. 588, 589.)

An investigation of the practice under which high ranking officers of the Alabama National Guard received

large sums in recruiting and retention extra duty pay was also investigated by a second Army group totally independent from the investigation of the First Army. The second investigation was conducted by Lt. Colonel Donald Lundy and was approved by Lt. General Fuller. This report stated:

> 29. MG Rollo, COL Speigner, and MAJ Hathorn did not violate existing regulations in performing this extensive active duty. However, the conditions under which the FTTD for R&R was justified and the method in which it was performed is considered an abuse of the purpose and intent of the FTTD for R&R active duty program and gave the appearance of having been performed for personal gain by each officer. . .
>
> 31. This abuse of active duty days under the FTTD for R&R program occurred to a large extent due to the lack of controls and definitive criteria for FTTD for R&R in NGB Pamphlet 37-78. This pamphlet, as currently written, coupled with the lack of other controls and policies, permitted blatant, albeit legal, abuse of the FTTD for R&R program by MG Rollo, COL Speigener, and MAJ Hathorn and probably by other members of the Army National Guard (R 574).

The Alabama Senate Budget Committe of which Defendant Jones was never a member was also extremely critical of this same practice, stating in its report:

> The Alabama National Guard is made up largely of dedicated officers and enlisted personnel who continue to perform notable services in our state and nation.

> Unfortunately, a few of the high ranking officers who run the Military Department have allowed their personal interest to override the best interests of the National Guard personnel.

The Budget Control Committee of the Senate recommended that the practice of working these "extra duty days by the Adjutant General or other officers in 'active duty status' be" allowed only when "specifically authorized in writing by the Governor." It referred to this practice of excessive extra duty days for high ranking officers as "double or triple dipping." (R. 592). It also recommended that the National Guard Bureau's recommendation be followed that "a maximum of twenty-four active duty days be allowed to State National Guard officers." (R. 591-593). The Budget Committee Report was extremely critical of a number of other practices of officers in the Alabama National Guard (R. 594-598).

The Office of the Examiner of Public Accounts was also critical of the National Guard administration in Alabama, and its report was given wide publicity. See, for example, an editorial appearing in Anniston Star,

October 17, 1976 (R. 604). Editorials and newspaper articles around the State of Alabama were also extremely critical of the practice of high ranking officers receiving both state and federal pay for the same type of duty assignment on the same day, reflecting sixteen hours of work on many of the same days. The practice was also called "double dipping" in the ROI and in the newspapers (R. 605-612). (These Record pages contain a few examples of such critical news articles and editorials which were widely published throughout the State of Alabama.)

When Plaintiff Cole appeared before the Interim Committee, Defendant Jones asked him how he could work at top capacity more than 365 days each year. He responded that he was "worn out" from this practice (R 612). For example, Plaintiff Cole was paid for 486 days in a single year, and had received pay for substantially more than 365 days for 1973, 1974, and 1975. See Anniston Star, April 15, 1976 (R 612). Although Colonel Cole said this practice left him "worn out," he nevertheless contended on his deposition

that such extra duty pay was a good practice and that it should be continued. Defendant Jones strongly disagreed with him then and now.

In October 1976, Governor Wallace issued an order which prohibited officers of the Alabama National Guard from receiving such extra duty pay unless expressly authorized by him in writing (R. 601).

In March 1977, after the ROI had been received by Governor Wallace, Governor Wallace requested and obtained the resignation of General Rollo as the Adjutant General of the Alabama National Guard.

Governor Wallace appointed Defendant General Gray to succeed General Rollo on or about March 24, 1977 "with orders to clean up the mess." (Gen. Gray depo. p. 44). That day General Gray called Respondent Jones and Representative Cates and requested that they have lunch with him. General Gray has testified in his deposition that he contacted Defendant Jones as Chairman of the Senate Standing State Government Committee, and Representative Cates as Chairman of the House Standing Committee on Military Affairs. (Gray depo., pp. 34, 35). The

Senate State Government Committee has jurisdiction of all military matters in the State of Alabama other than the appointment of general officers.

General Gray testified in his deposition that he had decided to suspend Colonel Cole for 30 days pending his investigation based on information which he had obtained in news articles and the ROI, but that he sought the meeting with Representative Cates and Defendant Jones prior to such action to be sure that the reports as to the total number of days as to which Colonel Cole and the other officers had been paid had been accurately reported (R. 612). General Gray testified that the people charged with abusing the extra duty days were in charge of the "whole ball game" at the Military Department of the State of Alabama, and in order for him to conduct an effective investigation, "it was absolutely essential for me to suspend them and get them out of there." (R 614, 615). Representative Cates and Defendant Jones merely confirmed that the reports were true.

The information Defendant Jones and Representative Cates gave General Gray was accurate and has never been

challenged. Defendant Jones did not recommend or suggest that Colonel Cole be suspended or that General Gray take any punitive action against Colonel Cole. As General Gray testified in his deposition, he did not seek Defendant Jones' advice and Defendant Jones gave him none with respect to any action that he might take (R. 616).

General Gray further testified in his deposition that during the period of suspension of Colonel Cole he conducted his own investigation and on the basis of such investigation discharged Colonel Cole. Defendant Jones had nothing to do with this decision of General Gray to discharge Colonel Cole, and General Gray has testified that his action was not based on any information which he received from Defendant Jones (R. 617).

Colonel Cole admitted on his deposition that he had no evidence that General Gray and Defendant Jones conspired to do anything to him other than that they had this meeting, and "bang, bang, bang" he got dismissed (R 620).

Defendant Jones has never suggested that any disciplinary or punitive action be instituted against Colonel Cole by any persons, although as a legislator

who has been charged with the responsibility of investigating the use of federal monies received by State agencies, Defendant Jones stated in his affidavit that he feels strongly that the practice and procedure under which these high ranking officers, including Colonel Cole, received large sums for extra duty in recruitment and retention was wrong. As noted, Colonel Cole had received pay for 486 days in a single year. Defendant Jones thought the practice should be stopped. The Interim Committee thought it should be stopped. The Senate Budget Committe thought it should be stopped. The National Guard Bureau and the Governor of Alabama ordered it stopped (Cole depo. p. 500). Moreover , the practice was in plain violation of Army regulations during much or all of the time Colonel Cole and high ranking officers were engaging in the practice (See Cole's depo., pp. 247, 501).

Colonel Cole appealed his dismissal by General Gray to the Alabama Personnel Board. After a lengthy hearing, this Board ordered him reinstated. But the Board denied him 33 days of salary in addition to the 30-day loss of salary imposed by General Gray at the time

of his suspension. The Board was also critical of the practice which permitted Colonel Cole and other high ranking officers to serve as much time on extra duty as Colonel Cole. The Board's opinion stated:

> The policy, or lack of policy, which permitted an officer to serve as much time on active duty as Colonel Cole served within the past three years has now been changed and that was an appropriate corrective action to be taken. . .
>
> The new Adjutant General might well judge that Colonel Cole has abused the rules and regulations which permitted him to serve so much time on active duty and it seems to us within the Adjutant General's prerogative to assess a disciplinary suspension against Colonel Cole for that adjudged abuse. But abuse of the rule, as distinguished from violation of the rule, does not justify dismissal from employment.
>
> There is evidence that Colonel Cole has not strictly followed formal requirements for filing leave forms but such failure is not nearly sufficient to justify dismissal from employment. There is also evidence that Colonel Cole has made what some would consider to be questionable expenditures of funds for dinners with Guard personnel from other states and for gifts, such as baby gifts for Guard employees, but those expenditures appear to have been authorized by the National Guard policy then in effect. . .
>
> The Board understands and respects the heavy burden on the present Adjutant General to correct and prevent even suspected violations of laws or regulations that have been the object of an official

> investigation and report by the Office of the Army Inspector General. The very existence of the report calls for action on his part. He is to be commended for assuming this obligation and for acting without hesitation in what he undoubtedly feels is in the public interest. In the case of Colonel Cole, however, the Board believes that the remedy should be more corrective than disciplinary (R 577, 578).

Whether Colonel Cole should have received 60 days' loss of pay, dismissal, or no loss of pay is not the issue. Defendant Jones had nothing to do with any punitive action. As the trial court stated, the action taken against plaintiff Cole "was a part of an overall disciplinary action taken against fourteen of the high ranking Alabama Army National Guard officers for an Alabama Guard-wide policy of violating certain regulations." (R 685).

The only conversations Defendant Jones had with Representative Holmes relative to the Alabama National Guard were in the meetings of the Interim Legislative Committee (R. 578).

Defendant Jones never made any public statements in which Colonel Cole's name was even mentioned. But plaintiff Cole's claim of defamation by Senator Jones

is based solely on the following statements which Plaintiff Cole contends stigmatized and injured him:

(1) On or about April 26, 1976, Defendant Jones made a statement as Chairman of the Interim Committe to the effect that Governor Wallace had halted payments of extra duty days to National Guard officers pending an army investigation. The statement, made in the Committee room incident to the Committee hearing was "The Committee believes that money has been squandered out there in active duty days." (News article from the Anniston Star, dated April 27, 1976, R. 625). The news article shows that the Committee had earlier disclosed that General Rollo, the State Adjutant General, in the preceding year had received a State salary of about $23,000 and another $22,700 in federal compensation by claiming 171 days of active duty in addition to his fulltime State job. Neither the article nor Defendant Jones' statement mentioned Colonel Cole. Moreover, the statement is absolutely true in expressing the opinion of the Committee. The trial court and the Court of Appeals properly found this statement to be absolutely privileged under the doctrine of legislative immunity (R. 693).

(2) In December of 1977, Major Hathorn was having a hearing in connection with the withdrawal of his federal recognition as an Army officer. This was long after the Interim Committee had been dissolved and the ROI had been published. It was also long after the action by General Gray in terminating the employment of Colonel Cole, and months after Cole's reinstatement by the Personnel Board. The charges against Major Hathorn included operating a novelty company which sold products to the National Guard, as well as abusing his position by obtaining excessive amounts of overtime pay under the recruiting and retention program.

Incident to his trial, General Rollo and Major Hathorn's attorney made derogatory, public statements which were widely circulated in the news media in Defendant Jones home county. For example, General Rollo charged in his testimony in the Hathorn hearing that his own firing as Adjutant General was part of a "stinking political activity" resulting from Senator Jones' efforts to get promoted to a general in the National Guard. When the television media asked Defendant Jones for a comment

to this charge, he stated:

> ". . . they are using. . . this to cover up, a camouflage, when ya'll really ought to be out there covering the trial and not worrying about my promotion. You ought to be out there covering the testimony of what's been brought out against these people. And all this is to take the heat off of them. Fred Jones has done nothing wrong. The people out there that's on trial are the ones that's done something wrong in the military department... as long as I'm serving as a Senator of Alabama... I'm going to serve the people of my district and I'm going to do what's right, and I'm going to speak out if it costs me a generalship. . ."

(3) At the same time in the December 6, 1977 issue of the Montgomery Advertiser, the following was reported:

> It was Jones, in his role as Chairman of a legislative committee, who first questioned recruiting practices in the Guard. The Committee's investigations led to a full-scale probe by the Army.
>
> The Committe action came after Jones had been denied the promotion to general.
>
> One of those ousted was Rollo, and Jones referred to him on Monday. "Rollo's after me," he said. "They are trying to strike back at me."
>
> "These people who were punished are playing politics," he said. "These defendants have played politics to the hilt. They put so much political pressure on the Governor that he had to back down."
>
> Defendant Jones was responding to the personal attack levelled at him.

(4) Finally, when Defendant Jones was again contacted in December 1977 concerning the Hathorn hearing, in response to questions from a news reporter concerning the charge that the Hathorn hearing was a "stinking political" mess stirred up by Senator Jones because he had not received a promotion and the suggestion that Jones failed to appear to testify, Senator Jones stated:

> "They don't want me to testify. Those people have been caught with their hands in the cookie jar and now all they can do is holler politics."

In no way did the remarks of Senator Jones represent, as charged by Plaintiff Cole, a "continuing vendetta" against Cole. Once again, Cole's name was not mentioned by Defendant Jones, nor was his name mentioned in the news articles surrounding Senator Jones' response to the charges aimed at him. No public statements were made by Senator Jones concerning any aspect of the National Guard controversy for many months until General Rollo and other made the charges against him to which he responded (R 580, 581).

Colonel Cole and Senator Jones have sharply differing opinions as to the practice of fulltime, State military officers drawing eight hours of State

pay on the same day they draw eight hours of federal pay for performing the same duty assigned to them in their State jobs, i.e., recruiting and retention. The Governor of Alabama and the United States Army agreed with Senator Jones and ordered the practice stopped.

Colonel Cole admitted on his deposition that the extent of the use of recruiting and retention funds by Colonel Cole and other high ranking Alabama National Guard officers had been prohibited at least since April 1975 by the National Guard Bureau, although not discontinued by Colonel Cole and the Alabama National Guard until some months thereafter and after the investigation by the Interim Committee had commenced (Cole depo. pp. 499-501). To the extent that the Committee of which Senator Jones was Chairman contributed to this practice being stopped by bringing the practice to the public's attention, it was discharging its obligation as a legislative committee. In responding to the charges levelled at Senator Jones that his efforts and the efforts of the Interim Committee to halt this practice were a "stinking political activity" because Senator Jones

had been denied a generalship, Senator Jones was responding to a personal attack on himself and was informing his constituency concerning legislative action taken by him and the Interim Committe of which he was Chairman.

SUMMARY OF ARGUMENT

When broken down, Petitioner has three basic arguments. He first contends that he was defamed by Respondent Jones acting under color of state law and that, as a result, he suffered a loss of a property or liberty interest. Secondly, Petitioner contends that Respondents conspired to deprive him of his job without due process of law and that they thereby denied him equal protection. Finally, Petitioner contends that these actions were taken against him because of his exercise of First Amendment rights. Petitioner alleges that Respondents' reprisals against him arose from his expressed support of a strong Army National Guard.

None of Petitioner's contentions are well taken. Accordingly, each was properly rejected by the Court of Appeals. The Fifth Circuit's decision is fully consistent with the prior rulings of this Court. The petition for a writ of certiorari should, therefore, be denied.

With regard to Petitioner's defamation claim, the statements made by Senator Jones must be divided into two time periods. The first period coincides with

the life of the Alabama Legislature's interim committee to investigate the use of federal monies received by State agencies. The Committee dissolved on June 3, 1976. Prior to that time, Senator Jones stated in the Committee room that "the Committee believes that money has been squandered out there in active duty days." This statement unquestionably was protected by absolute legislative immunity. In addition, the statement was true. The only other statements allegedly made by Senator Jones prior to June 3, 1976, were in conversations with Major Cummings. There is no evidence that these statements were defamatory or even as to what the statements were. Moreover, Petitioner was afforded a due process hearing in connection with all charges against him, and that is all the law requires. Finally, if the statements made by Jones reported a violation of National Guard regulations, they were privileged and cannot, in any event, be admitted into evidence.

The second period relevant to Petitioner's defamation claim is post June 3, 1976. All remarks made

by Senator Jones after that time occurred in December of 1977. Because Petitioner had been reinstated to his position on July 28, 1977, however, any alleged defamation clearly could not have been attended with the loss of a property or liberty interest. Under Paul v. Davis 424 U.S. 693 (1976), therefore, Petitioner cannot recover under the Civil Rights Act. Moreover, the evidence is undisputed that Jones' remarks made in December of 1977 did not refer to Petitioner Cole. Finally, all statements made by Jones were true.

Petitioner's second contention is that Respondents conspired to deprive him of his job without due process of law. This contention is without merit for several reasons. First, as to Respondent Jones, the evidence failed to raise a fact issue with regard to his alleged conspiratorial participation. The Court of Appeals correctly so found, and that finding should not be reviewed on a petition for a writ of certiorari. Secondly, even if there had been a factual issue with regard to a conspiracy, the Court of Appeals' decision

still was appropriate. Several different entities investigated Petitioner's conduct and found that he had violated National Guard policy. A conspiracy to fire someone for a legitimate reason is not unlawful so long as due process rights are protected. That is, although there was no conspiracy in this case, a conspiracy in and of itself is not unlawful. Moreover, so long as there is a legitimate reason for attempting to terminate someone's employment, it does not matter what the motive is. Finally, with regard to Respondent Jones, Petitioner's cause of action based on a conspiracy is defeated by the doctrine of legislative immunity.

Petitioner's final contention is that Respondents took action against him because of his expressed support of a strong Army National Guard. Consequently, according to Petitioner, Respondents have violated his First Amendment rights. The Court of Appeals properly found that absolutely no evidence supported this allegation.

ARGUMENT

I The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's claim based on defamation.

All claims based on alleged defamatory statements made by Respondent Jones must be divided into two time periods. The first period coincides with the life of the Alabama Legislature's Interim Committe to investigate the use of federal monies received by State agencies. The Committee dissolved on June 3, 1976. Prior to that time, Senator Jones stated in the Committee room that "The Committee believes that money has been squandered out there in active duty days." The only other statements allegedly made by Senator Jones prior to June 3, 1976 were in conversations with Major Cummings.

Although there is no evidence that any statements made during this time period related to Petitioner Cole, they are in any event protected by the doctrine of absolute legislative immunity. This immunity is derived from the common law and survived the passage of the Civil Rights Act of 1871. Tenney v. Brandhove, 341 U.S. 367, 61 S.Ct. 783 (1951).

Legislative immunity encompasses any legitimate legislative activity. Moreover, Tenney makes clear that the activities of a fact finding committee fall within the scope of "legitimate legislative activity." Consequently, any actions taken by Respondent Jones prior to June 3, 1976 are protected.

Petitioner contends to the contrary that Jones' communications with Major Cummings prior to June 3, 1976 are not immunized. Even if Petitioner is correct, there is absolutely no evidence that Jones said anything of a defamatory nature to Cummings. Moreover, under the doctrine enumerated by this Court in Vogel v. Gruaz, 110 U.S. 311, 4 S.Ct. 12 (1884), any such communications would be privileged. That is, if Jones were reporting the violation of some laws, or of National Guard policy, the government official to whom the information was given could not testify in any subsequent action brought by Cole against the informer. The policy underlying this Court's holding was to encourage citizens to report law violators to the appropriate authority. Consequently, not only is there no evidence before this Court of any defamatory communication, but

also there culd be no such evidence at trial. Accordingly, Respondent Jones was entitled to have a summary judgment in his favor.

Finally, with regard to the pre-June 3, 1976 period, Petitioner was afforded a due process hearing on all charges against him. That is all that the law and the constitution require. See Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976); Board of Regents vs. Roth, 408 U.S. 674, 92 S.Ct. 2701 (1972).

The Fifth Circuit's decision also was correct with regard to the period of time following the expiration of the legislative committee, even assuming that there is no legislative immunity. In Paul v. Davis, supra, a person was erroneously identified as a shoplifter on a flyer circulated by a local chief of police. The Court acknowledged that the facts would support a state court claim for defamation, but held that neither the Fourteenth Amendment nor 42 USC §1983 made actionable a defamation by a state official.

The Supreme Court in Paul v. Davis stated:

> ". . . Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts had been

> invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the state may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be administered by the States. We have noted the 'constitutional shoal' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckenridge, 403 U.S. 88, 101-102, 91 S.Ct. 1790, 1797-98, 29 L.Ed. 2d 338, 347-48 (1971); a fortiori the procedural guarantees of the Due Process Clause cannot be the source for such law." 96 S.Ct. p. 1160.

Petitioner contends that his injury was more than defamation because he was removed from his job. But the cases relied on by Petitioner involving defamation coupled with job removal were actionable under §1983 or the Fourteenth Amendment only when plaintiffs were denied a hearing and thus were denied procedural due process. See e.g., Board of Regents v. Roth, supra, holding that if a teacher is defamed in connection with his discharge, where he has tenure, he is entitled to a hearing. Petitioner Cole not only was granted a full hearing before the State Personnel Board, but also that Board ordered him reinstated with some back pay, despite that it found that Cole's conduct was inappropriate.

It should be noted in this regard that the action of General Gray in suspending and then terminating the employment of Colonel Cole was not in any way caused by any action by Respondent Jones, except that prior to Colonel Cole's suspension, General Gray sought and obtained from Respondent Jones confirmation that the extra duty days reported in the ROI for Colonel Cole were correct. But even if General Gray had been urged to terminate Colonel Cole by Respondent Jones and had acted on such urging so that the act of General Gray became in some way the act of Respondent Jones, the suspension and discharge with a review by the State Personnel Board not only did not deny plaintiff any procedural due process, but also they were not violative of any Fourteenth Amendment substantive due process right. The reviewing authority, the State Personnel Board, after a lengthy hearing conceded that the acts of Colonel Cole were wrongful and not only allowed the initial suspension of General Gray to stand, but also added a further suspension of thirty days.

There are several other reasons that the Fifth Circuit's decision was correct. First, at the time

the post June 3, 1976, statements were made, Cole already had been reinstated to his job. That is, no property interest deprivation attended the alleged defamation.

Secondly, these statements were in response to widely publicized remarks in press and television in Senator Jones' home county charging that the hearing involving not Cole, but rather Major Hathorn, was a "stinking political" mess stirred up by Senator Jones because of his disappointment in not getting a promotion in the National Guard. Because Senator Jones' remarks did not in any way identify or relate to Cole, who already had been reinstated, the remarks could not be actionable. Petitioner Cole was not a party in the Hathorn hearing. He had levelled no accusation at Jones, and Jones' remarks referred to the people on trial who were accusing him of wrongdoing.

Thirdly, the trial court properly found that Petitioner Cole was "a public person by virtue of his high position in the Alabama National Guard as well as by the great public interest created therein by evidence of alleged inproprieties practied therein." (R 693).

The remarks were, therefore, not protected by the First Amendment and were not actionable.

In order to uphold the "profound national commitment...that debate on public issues be uninhibited, robust and wide open," the Court in New York Times v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710 (1964), held that the First Amendment barred suit by a public official based on his conduct as a public official unless there was a showing that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.

In the instant case, not only did Senator Jones and his committee have information that caused them to believe that certain high ranking officers, including Colonel Cole, had violated Army regulations and were abusing their high positions to get excessive federal benefits, this was the conclusion of the Governor of Alabama who ordered the practice halted. It was the conclusion of the ROI which was authorized by Major Holmes and Major Cummings and approved by the Commanding General of the First Army. It was the conclusion of the Senate Budget Committee whose report is quoted in

part in the Statement of the Case. It was the conclusion of the State of Alabama Personnel Board. It was the conclusion of Lt. Colonel Lundy and Lt. General Fuller as the result of Lt. Colonel Lundy's separate investigation. It was the opinion of General Gray who was appointed Adjutant General by Governor Wallace. (See his statements in his deposition, pp. 66, 179).

Moreover, the fact that this practice was in violation of Army regulations was admitted by Colonel Cole (Cole depo. p. 501). Thus Senator Jones' statements insofar as they can be said to relate at all to Colonel Cole were accurate when they say: "The people out there that's on trial are the ones that's done something wrong...." If this related to Colonel Cole, as Petitioner insists, it had to relate to the practice widely publicized in the news media and described as "double dipping" and the other offense charged to Colonel Cole in the ROI of "back dating orders." Since "double dipping" and "back dating orders" were prohibited by Army regulations, and since Colonel Cole admitted participation in both practices to his substantial financial benefit, it is inconceivable that describing the activity as "wrong"

or charging that "they are the ones that have been caught with their hands in the cookie jar" is actionable. Colonel Cole admitted that the practice of getting eight hours of pay from the State and then eight hours of federal pay within the same twenty-four hour day was prohibited, but as Personnel Officer he continued to allow himself and others to do it until after the Interim Committee began its investigation (Cole depo. p. 501, R. 624).

As the Supreme Court stated in Greenbelt Cooperative Pub. Co. v. Bresler, 398 U.S. 6, 13, 90 S.Ct. 1537 (1970), the charge that the plaintiff committed "blackmail"--clearly a criminal offense--was not actionable because the factual basis for the remark was evident in the context of the public discussion, and, therefore, was not actionable when published or spoken. Defendant Jones' remarks were clearly referring to the acts of Hathorn and General Rollo which were characterized as wrongful in the ROI, and if the remark can be read as including Cole, it could have no other reference than his actions in violation of Army regulations, which, when brought to the attention of the Governor, the public, and the Army, were promptly stopped.

In Gertz v. Welch, Inc. 418 U.S. 323, 94 S.Ct. 2997 (1974), the Court pointed out that those "properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard of the truth." (Emphasis added.) In the instant case, not only is there no clear and convincing evidence in the thousands of pages of depositions that Respondent Jones made any comment with knowledge of its falsity; but also there is not any evidence that any statement by Defendant Jones was false.

Apparently Colonel Cole does not believe that he or the other officers who were paid for over 400 days in a single year did anything "wrong"--even though he concedes the practice violated applicable Army regulations (Cole depo. p. 501 R. 624.) Nevertheless, the unanimous agreement of all who investigated or otherwise became aware of the practice of "double dipping" that it was wrong is evidence that the plaintiffs' view of the wisdom nad propriety of continuing the practice lost out in the arena of free discussion. It would make

a mockery of the First Amendment to say that the Petitioner, having been adjudged wrong by the bar of public opinion and by every individual and agency who has reviewed his activity, can nevertheless harass a legislator who criticized his conduct and put that legislator to the tremendous expense of defending himself in this suit.

II The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's conspiracy claim.

Petitioner contends that Respondent Jones conspired with the three other Respondents to deprive Colonel Cole of his civil rights in violation of §§ 1983 and 1985 of 42 USC. [1/] But, as properly held by the Fifth Circuit, the evidence of such a conspiracy is totally lacking, as is the evidence of any deprivation of Colonel Cole's civil rights.

Petitioner contends that Respondent Jones conspired with Major Cummings to get Major Cummings to write a critical report of Colonel Cole. What is the evidence from thousands of pages of depositions and affidavits?

On March 9, 1976, after the Interim Committee had held public meetings at which reports of wrong-

1/ The claim under Section 1985 is totally misdirected. Under Section 1985, there must be a finding of some kind of invidiously discriminatory motivation, such as racial or religious bias. See Save Our Cemeteries v. Archdiocese of New Orleans, 568 F.2d 1074, (CA 5), and Griffin v. Breckinridge, 403 U.S. 88, 91 S.Ct. 1790.

doing in the Military Department had been widely publicized in the press and television, General Rollo, the Adjutant General of the State of Alabama, requested that the Commanding General of First Army conduct an investigation of the Alabama Army National Guard. Major Cummings and Major Holmes were sent from Washington D.C. by First Army to conduct the investigation. Neither man had had any previous contact with any of the Alabama respondents. Shortly after the arrival of Majors Cummings and Holmes, they were contacted by Senator Jones as Chariman of the Interim Committee. The contact was a telephone call from the Committee room with the Committee in session and at the instance of the Committee. The call merely invited these officers to meet with the Committee. Major Cummings first sought and obtained clearance from First Army for such a meeting, and then he and Major Holmes met briefly with the Committee. This single meeting was the only personal contact that Respondents Jones or Holmes or the Committee ever had with Major Cummings. (General Gray never had any contact with these officers until many months after the ROI was published.)

At this meeting, Senator Jones on behalf of the Committee offered to make available to Majors Cummings and Holmes any information which the Committee had obtained with respect to the National Guard. He advised them generally as to the nature of this information. It is the judgment and recollection of Respondents Jones and Holmes that Petitioner Cole's name was never mentioned. There is no evidence to the contrary.

Majors Cummings and Holmes never sought to obtain the information which the Committee offered to share with the investigating officers. Respondent Jones as Chairman of the Committee at the instance of the Committee and from the Committee room with the Committee in session did on four or five subsequent occasions telephone Major Cummings to advise him of reports concerning irregularities in the National Guard which had reached the Interim Committee. Colonel Cole's name was never mentioned in these conversations, and the matters discussed did not even concern matters in which Colonel Cole was involved (R 573). Such

telephone conversations included reports of such wrongs as improper use of helicopters, nepotism and misuse of National Guard funds in expenditures. Colonel Cole was not involved in these matters at all.

Colonel Cole in his deposition conceded that he had no knowledge of any communication between Respondent Jones and either Majors Cummings or Holmes other than the meeting when the Committee was in session, and the few telephone calls from Senator Jones to Major Cummings at the instance of the Committe and while the Committee was in session (R 584).

Even if in some inexplicable way these meetings and telephone calls could constitute a basis for a conspiracy charge, they would not be actionable, being protected by legislative immunity. As stated in Slavin v. Curry, (CA 5) 574 F.2d 1256, 1264, a judge is absolutely immune from a suit for damages even for participating in a conspiracy if he did not participate in the conspiracy other than in his judicial role. Clearly the only contact between the Alabama legislators and Cummings was in the formers' capacities as legislators performing legislative functions.

The ROI was many hundreds of pages in length with additional hundreds of pages of exhibits. Majors Cummings and Holmes interviewed dozens of witnesses, including Colonel Cole. Its information far exceeds any information obtained by the Interim Committee. The ROI was sharply critical of many areas within the Alabama National Guard. Most of the areas of criticism did not relate to Colonel Cole at all. Some did. Colonel Cole as Personnel Officer was criticized in the ROI for violating Army regulations by issuing orders after the duty had allegedly been performed or "back dating orders." Colonel Cole concedes that he so violated applicable Army regulations (Cole depo. p. 247). None of the Alabama respondents had any knowledge of this violation by Colonel Cole until reading it in the ROI. The ROI also criticized the Personnel Officer for allowing high ranking officers to work eight hours for the State and then claim an additional eight hours of federal pay on that same day for allegedly working an additional eight hours. This was also in plain violation of applicable Army orders and directives (Cole depo., p. 501 R. 625).

It is incredible that anyone who has read the ROI and seen the hundreds of pages of exhibits thereto would suggest that it was the product of any action by respondent Jones. Respondent Jones thought the excessive number of days which were in violation of existing Army orders was improper and should be stopped. Respondent Holmes also thought they were improper and should be stopped. The ROI correctly stated that they were in violation of the letter and the spirit of Army regulations and should be stopped. This is the one common thread for alleging a conspiracy between Jones and Cummings. But as already pointed out, substantially every group and every individual who has examined the practice has been sharply critical of this parctice, and where such groups or individuals have had an opportunity to take action, they have ordered it stopped. The Senate Budget Committee, The Alabama Personnel Board, Governor Wallace, the Department of Examiners and Accounts, Lt. Colonel Lundy, Lt. General Fuller, and many editorials in various Alabama newspapers have all called for the end of the practice and criticized those who like

Colonel Cole have engaged in the practice. See, for example, the news articles and editorials in the Record at pages 588,589, 604, 605,607, 609-611.

These individuals, groups and newspapers are not part of a conspiracy. They sincerely believe as Senator Jones believes that the practice which was actually in violation of clear regulations of the Army was wrong.

One news article in the Record quotes at length from a staff report of the Budget Control Subcommittee charging that "a select few high ranking Alabama National Guard officers have put personal gain above the best interest of the Guard." (R.607) Senator Jones was not on the Budget Control Subcommittee. No statement by Senator Jones is any stronger with respect to this practice than the report of the Budget Control Subcommittee. Is this Committee also a conspirator, along with Governor Wallace, the Personnel Board, other Army review agencies, and the newspapers of the State?

In the Montgomery Advertiser of May 12, 1976, for example, an editorial is vehement in its criticism of

this practice (R. 605). In part the editorial states:

> "And right here in Alabama, top National Guard officials have been caught being a little too generous with themselves on pay day.
>
> The situation has become so serious that the State Adjutant General may be asked to turn in his stars. (He was and resigned.)
>
> The question of honesty remains in the shadows, but a number of top Guard officers have managed to do quite well financially of late. . .
>
> Well, it may be that. . .Rollo and his select group of double-dippers will be called to task for their misdeeds.
>
> Perhaps, in their own minds, the Guard officers who reaped such substantial financial rewards for their efforts, honestly believe they did no wrong.
>
> It may even be that they can justify their actions, by the small print in some regulation.
>
> But the entire matter still has the aroma of fish left too long in the sun.
>
> The Governor was correct in putting a belated halt to Rollo's overtime program, and the interim legislative panel looking into the matter is justified in calling them to task for their transgressions.

Another editorial in the Montgomery Advertiser on March 24, 1977 refers to the "double dipping" and states

> "The practice is clearly illegal, and in fact, in the course of the legislative inquiry, Governor Wallace directed that double dipping be stopped at once."

This editorial was written without having seen the ROI and called for its release to the public (R. 610).

The facts in the ROI were not supplied by Senator Jones or even by the Interim Committee. But the accuracy of the basic facts in the ROI have not been challenged. Colonel Cole's criticism of the ROI has been that its language was too "flowery" (Cole depo., p. 204), and that he didn't like the "manner" of Major Cummings. (Cole depo., p. 205) Stated another way, Colonel Cole objected to the characterization of the facts in the ROI, but he could not deny that Army regulations were violated in the program that resulted in the payment for 486 days in a single year to Colonel Cole.

The evidence of any conspiracy embracing Jones and General Gray is equally lacking. General Gray was appointed by Governor Wallace to succeed General Rollo after Governor Wallace had procured General Rollo's resignation. General Gray promptly after notice of his appointment, contacted Senator Jones as Chairman of the Senate Committee with oversight of the Alabama Military Department and Representative Cates as

Chairman of a similar committee in the Alabama House of Representatives. He wanted to establish a relationship with these Chairmen and asked them to have lunch with him. He testified that he had already determined to suspend Colonel Cole and several other high ranking officers for thirty days, but before taking the action he sought verification from these legislators as to whether the news reports and information in the ROI concerning the extra duty days for these officers was correct (R. 612). Senator Jones and Representative Cates correctly confirmed the accuracy of the information. This was the sum of the conversation between Jones and Cates and General Gray. Cole testified that he had no evidence that Jones and Gray conspired to do something to injure him other than that they "had a conference and bang, bang, bang," he got dismissed (R. 620).

General Gray testified that he had determined that it was necessary to suspend the high ranking officers involved in the large amount of extra duty pay prior to meeting with Senator Jones and Representative Cates because they controlled the Alabama Military Department, and he could not conduct an effective investigation with

them on the scene. (R. 614,615)

The ultimate termination of Cole by General Gray followed General Gray's own investigation. His decision was based "entirely on the ROI and his own independent investigation and judgment." (R. 617) He never consulted with Senator Jones with respect to this decision and received no advice from him (R. 616). In his deposition, General Gray forcefully expressed his opinion that "it is totally intolerable in the military for a high ranking military officer to use his position for personal gain." (Gray depo., p. 66) His investigation disclosed that plaintiff Cole had so used his position. He testified unequivocally that in his opinion what these high ranking officers had done "was very wrong". (Gray depo., p. 179)

Finally, there is no evidence that Jones and Holmes were part of a conspiracy to injure Cole. The only times they ever saw each other where National Guard matters were discussed were at meetings of the Interim Committee, and on the one occasion long after Cole had been reinstated when they met and gave public statements

in response to the charges by General Rollo and Major Hathorn's attorney that the criticisms by Senator Jones and the Interim Committee were all a "stinking political" gimmick stirred up by a frustrated Senator Jones.

In his deposition taken months after suit was filed, Colonel Cole stated that the only evidence of a conspirac between Jones and Holmes was the news articles in which Jones and Holmes were critical of the excessive use of extra duty days. As Cole stated: "There was a continuous outpouring of information from the Committee from the beginning."

"Q. Do you have any other evidence?

A. No, not now.

Q. You have nothing further, no further evidence to support it?

A. No." (Cole depo., pp. 568, 569)

As the District Court stated in its opinion, "proof of knowledge of a conspiracy must be clear and unequivocal." (R. 686) Not only is there no "clear and unequivocal proof of a conspiracy," but also after thousands of pages of depositions, there is no evidence at all of a conspiracy. In a free society can any man

who speaks out against official acts by public officials really be sued for $8,000,000 on a conspiracy theory where the sole evidence rests on the sequence of events that he served on a legislative committee which was critical of extra duty days, that an investigation of this practice by officers from First Army and other investigating agencies with which he had absolutely no contact were also sharply critical, that the Adjutant General appointed to succeed General Rollo thought the practice was a violation of the officer's responsibility and fired him based on his own investigation and the report of the Army investigation? Governor Wallace reviewed the ROI, acted on it and called for the resignation of General Rollo. Even if Senator Jones had advised Cummings of the facts in the report, which he did not do because Cummings conducted his own exhaustive investigation, this would not be evidence of a conspiracy.

The same is true of course of General Gray where Colonel Cole says the evidence of the conspiracy is the meeting between General Gray and Senator Jones and Representative Cates and then "bang, bang, bang," he

was fired. Surely persons in this country cannot maintain a suit on such evidence. To allow such suits will not have merely a "chilling" effect on efforts of legislative oversight committees to criticize the performance of public officials, it will have a terminal effect. The Supreme Court pointed out in Ingram v. United States,360 U.S. 672, 79 S.Ct. 1314, that "charge of conspiracy are not to be made out by piling inference upon inference." Although Ingram was a criminal case the danger in allowing proof of conspiracy to rest merely on flimsy inference applies equally to a civil suit.

Jones was not entitled to summary judgment on the conspiracy claim for another reason. That is, Petitioner was not deprived of any rights, privileges, or immunities under the Constitution. If two people report on an event and each concludes that the action of a third person was improper, their conclusions and their statements of thier opinion that the third party's action was wrongful, does no and should not give rise to a §1983 action for a conspiracy depriving anyone of his Constitutional rights.

In a hypothetical situation, a Senator is Chairman of an Interim Committee to investigate the use of federal

monies by a state agency. He is also chairman of the standing committee directly responsible for oversight of this agency. He is critical of some of the practices of the higher paid officials in the agency and calls for an investigation of the agency. He offers to provide the investigating officers with all of the reported irregularities on the part of these officials, which have come to the attention of the committee. The investigating officers receive these reports and make their own investigation which also is sharply critical of some of these reported irregularities and of other irregularities developed by the independent investigation of these officers. The Governor obtains the resignation of the head of the agnecy because of these "irregularities." On the basis of his own investigation and the report of the investigating officers, the person who replaced the agency head first suspends and then discharges the Petitioner because of Petitioner's failure to follow applicable regulations. The Petitioner appeals his termination under state law to the agency charged with the responsibility to hear appeals. This agency is critical of the acts of the Petitioner but

deems the punishment of termination too severe and orders reinstatement but adds an additional thirty days to the original suspension. Even on these facts, could the Senator be subject to a Section 1983 suit? Of course not. The Petitioner has not been denied a Constitutional right, and these facts do not permit a jury to conclude that a conspiracy exists to deny him his Constitutional rights.

Of course the facts with Senator Jones differ from the hypothetical in that General Rollo and not Senator Jones called for the investigation by First Army. Senator Jones had no such authority. It also differs in that the investigating officers did not accept Senator Jones' offer to turn over to them reported irregularities. But in neither event could the Senator consistent with the law and the Constitution properly be subject to this suit.

As previously stated, in order to maintain a conspiracy action under Sec. 1983 there must have been an "actual denial of due process or equal protection" by persons acting under color of state law. Hanna v. Home Ins. Co., 281 F. 2d 298 (CA.5). In the recent case of Slavin v. Curry, 574 F. 2d 1256 (CA 5), the Fifth Circuit

Court reaffirmed its holding in Hanna that actual denial of due process or equal protection is a requisite to maintaining a conspiracy action under Section 1983.

As the Court of Appeals of the Second Circuit stated in Canty v. Board of Education, 448 F. 2d 428 (CA 2):

> "The civil rights statutes confer jurisdiction only when 'the right or immunity is one of personal liberty not dependent for its existence upon the infringement of property rights.'"

The Canty court quoted Tichon v. Harder, 438 F. 2d 1936, 1402 (CA 2):

> "Congress did not intend that every claim of unfair treatment be a state of an employee, even accompanied by a lack of procedural due process, could be brought to the federal courts."

In the instant case, Petitioner Cole has been accorded procedural due process, and the due process hearing before the Personnel Board ordered his reinstatement. He was in no way denied equal protection of the law. In Pool v. Williams, 280 Ala. 337 194 So. 2d 87,88, the Alabama Supreme Court pointed out that all employees of the State accept the provisions of law governing their employment. "To suspend an employee in conformity with the provisions of law governing his employment does not deprive the employee of right or property without due process of law."

Finally with regard to the conspiracy claim, it must be re-emphasized that a conspiracy in and of itself is not unlawful. If a group of people make a joint effort, which was not present in this case, to fire someone for a legitimate reason, they have not violated the Civil Rights Acts. Because Cole was in fact guilty of some wrongdoing and because that wrongdoing was the basis of his discharge, he can state no cause of action based on a conspiracy.

III The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's First Amendment claim.

Petitioner finally attempts in his petition for a writ of certiorari to assert a claim based on the First Amendment. In that claim, Petitioner maintains that he was discharged because of his advocacy of a strong military defense. It suffices to say that there is not a shred of evidence in the record to support that claim. On the lack of evidence alone, summary judgment is appropriate.

This Court's decision in Mt. Healthy City School District Board of Education vs. Doyle, 429 U.S . 274, 97 S.Ct. 568 (1977), however, also is relevant. In that case, the Court held that even if a plaintiff can prove that one of the reasons for his discharge was unconstitutional, he still is entitled to no relief if there was another, legitimate reason for his discharge. All of the evidence before this Court shows that Petitioner Cole was discharged because of his wrongdoing. Even if one of the defendants below objected to a strong military defense, and

there is absolutely no evidence that any of them did, that was not the reason for Cole's discharge. At the very least, even considering the evidence in the best light for Petitioner, Colonel Cole must acknowledge that one reason for his discharge undisputedly was his "double dipping." Whether that activity was unlawful is not important. There is no question but that Cole's conduct constituted a legitimate basis for his discharge.

CONCLUSION

In conclusion, there are no significant issues in this case that warrant this Court's review. Petitioner's attempt to build this case into a forum to argue the propriety of an all-volunteer Army simply makes no sense under the facts presented. There is no evidence that any respondent has a view different from Petitioner's. There is no evidence that that issue had anything to do with Petitioner's discharge.

In summary, this case has been considered by the District Court and the Fifth Circuit Court of Appeals. The issues have been fully explored. The decision of the Fifth Circuit was fully in accord with the decisions of this Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

Robert D. Segall

ROBERT D. SEGALL

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Response of Fred R. Jones to Petition for Writ of Certiorari upon Honorable Wade McCree, Solicitor General of the United States; Honorable William B. Moore, Jr Honorable Alvin T. Prestwood; Honorable Claude P. Rosser, J Honorable Sarah Greenhaw, Honorable Sterling Culpepper; and the Deputy Assistant Judge Advocate of the Department of the Army; Attorneys for Respondents-Defendants, by placi said copies in the United States mail, postage prepaid, and properly addressed to their respective business addresses as follows:

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This the 26th day of August, 1981.

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No. 80-2218

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM R. COLE, PETITIONER

v.

HENRY B. GRAY, III, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether respondents were entitled to summary judgment in petitioner's suit alleging a conspiracy to deprive him of his constitutional rights under the First, Fifth, and Fourteenth Amendments.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2218

WILLIAM R. COLE, PETITIONER

v.

HENRY B. GRAY, III, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A33-A58) is reported at 638 F.2d 804. The opinion of the district court (Pet. App. A1-A30) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1981 (Pet. App. A62-A64). A petition for rehearing was denied on March 31, 1981 (Pet. App. A59-A61). This petition for a writ of certiorari was filed on June 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] This brief is submitted on behalf of Francis Cummings, the sole federal respondent in this case.

STATEMENT

Petitioner was for many years a nonprobationary employee of the Alabama Military Department and a federally-recognized colonel in Alabama's Army National Guard. He held the permanent merit system classification of Military Executive Officer and served as chief of the Personnel and Administrative Division of the Military Department (Pet. App. A35). After the compulsory military draft was ended in 1971, federal funds were made available to assist the "recruitment and retention" efforts of state National Guards. Petitioner and other officers were compensated from these funds for time spent in recruitment and retention activities (Pet. App. A36).

In October 1975, the Alabama legislature passed a resolution creating a joint interim committee to investigate the use of federal "recruitment and retention" funds in the State. The resolution was introduced by respondent State Senator Fred R. Jones. The committee consisted of three senators, including Jones, and three state representatives, including respondent Alvin Holmes (Pet. App. A36).

The hearings of the interim committee were open to the public and were widely reported by the news media throughout the State. The committee discovered that high-ranking officers in the Military Department, including petitioner, had been paid for a substantial number of extra duty days. During the hearings, Jones stated that funds had been "squandered," and Holmes stated that petitioner had not worked on all the days for which he received pay (Pet. App. A37).

Adjutant-General Charles A. Rollo asked the Commanding General of the First United States Army to conduct a parallel investigation of Alabama Na-

tional Guard practices. Pursuant to this request, respondent Major Francis Cummings was sent from Washington, D.C., to Alabama to prepare a report of inquiry. He spoke with Jones on several occasions during the course of his investigation (Pet. App. A38). The interim legislative committee was dissolved on June 3, 1976 (*ibid.*). Major Cummings' report was filed on September 14, 1976. Cummings found that petitioner: (1) had participated in defrauding the federal government of hundreds of thousands of dollars through his method of authorizing overtime work in the Alabama Military Department; and (2) had received pay for work that apparently was not necessary (Pet. App. A38-A39). At the governor's request, the report was released to the public in March 1977, and thereafter Rollo resigned his post. Respondent General Henry Gray was appointed to succeed him (Pet. App. A39).

Gray spoke with Senator Jones concerning the Military Department's problems. Following these conversations, Gray suspended petitioner, and, on April 20, 1977, dismissed him from his non-probationary merit system position (Pet. App. A39). Gray forwarded to the First Army a request that petitioner be stripped of his federal recognition as a colonel in the National Guard (Pet. App. A39-A40).

Petitioner appealed his dismissal to the Alabama Personnel Board, and, on July 28, 1977, the Board ordered him reinstated. The Board did, however, criticize petitioner's conduct, and it denied him 33 days of salary (Pet. App. A40). Respondent Gray publicly commented that the occasion of petitioner's reinstatement was "a sad day for honesty and integrity in the government" (*ibid.*). Gray reduced petitioner's responsibilities to those of a branch chief

within the Plans, Operations, and Training Division of the Military Department (*ibid.*). At the governor's request, Gray dropped his recommendation that federal recognition of petitioner's rank be withdrawn (*ibid.*).

In March 1978, petitioner filed this suit against Gray, Jones, Holmes, and Cummings in the United States District Court for the Middle District of Alabama. Invoking 42 U.S.C. (& Supp. II) 1983 and 1985, as well as the First, Fifth, and Fourteenth Amendments, he alleged that respondents had conspired to oust him from his position and to damage his reputation. He sought damages for his temporary dismissal and for the allegedly defamatory remarks made by respondents as part of their conspiracy. The district court denied the motions for summary judgment filed by the legislative respondents, Jones and Holmes, but it granted the similar motions filed by respondents Gray and Cummings (Pet. App. A23-A24, A26). Petitioner appealed the latter action, and the district court and the court of appeals, acting in accordance with 28 U.S.C. 1292(b), authorized an interlocutory appeal by Jones and Holmes (Pet. App. A31-A32).

The court of appeals (Pet. App. A33-A58) affirmed the dismissal of the claims against Gray and Cummings. With respect to the summary judgment motions filed by Jones and Holmes, the court reversed and remanded with instructions that the complaint be dismissed as to them as well. The court of appeals held as a matter of law that Gray's actions came within the scope of the qualified immunity recognized in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (Pet. App. A48). Similarly, the court held that "[i]t is manifestly apparent that [Cummings'] actions were taken in good faith, within the scope of his discre-

tion and the responsibilities of his office. * * * Cummings' actions were clearly within the range of the *Scheuer* immunity" (Pet. App. A51). The court also ruled that petitioner's allegations against Jones and Holmes were either unsupported or insufficient to state a claim for relief. Citing *Paul* v. *Davis*, 424 U.S. 693 (1976), the court held that "the loss of a good name, as destroyed by defamation on the part of a public official, is not a 'liberty or property interest' for which [the Reconstruction civil rights] statutes provide protection" (Pet. App. A55-A56). As for petitioner's claim of conspiracy to deprive him of his position, the court stated (Pet. App. A56-A57):

> [T]he evidence does not nearly support a theory of conspiracy * * *. [Petitioner] has shown a possible motive of personal animosity on the part of Jones, but there is not an iota of substantiation for his allegation that he was fired in retaliation for utterances protected by the First Amendment. He has shown minimal contact between the executive and legislative [respondents], with no buttressing proof of the actual nature of the information conveyed. No proof of the making or accepting of statements known to be false exists in the record. Finally, there is the discharge itself. These elements, murky allegations as to motive plus mere contact plus the fact of discharge are linked together by speculation and conclusory allegations.

The court of appeals accordingly concluded that "[t]he evidence was wholly insufficient to raise a fact issue for trial on the conspiracy complaint" (Pet. App. A57).

ARGUMENT

The court of appeals correctly rejected each of petitioner's arguments, and its decision is fully consistent with the holdings of this Court. Petitioner essentially seeks a reconsideration of the factual conclusions reached by the courts below, and further review is not warranted for that purpose.

1. Petitioner first contends (Pet. 23-31) that summary judgment should not have been granted because his complaint and supporting materials raised substantial factual questions involving such subjective factors as motive and intent.

As the court of appeals correctly observed, however, petitioner "has shown minimal contact between the executive and legislative [respondents], with no buttressing proof of the actual nature of the information conveyed" (Pet. App. A56-A57). In order to state a claim of conspiracy under 42 U.S.C. (Supp. II) 1985(3), petitioner must show "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) (footnote omitted). Petitioner altogether fails to address this criterion. He suggests only that he and the other National Guard officers who participated in recruitment and retention activities were illegitimate targets of respondents' investigations. This is insufficient to satisfy the requirement established by *Griffin* v. *Breckenridge, supra.*

Moreover, petitioner's allegations regarding the existence of a conspiracy are conclusory and not specific. Indeed, when respondent Cummings was sent to conduct the investigation of the Alabama National Guard, he had not previously had any contact with any of the other respondents. Cummings, in fact,

completed his investigation before respondent Gray was appointed, and the two men never met (Pet. App. A48).

Nor is there any evidence that Jones and Holmes were part of a conspiracy with Cummings to injure petitioner. They met to discuss National Guard matters only at a meeting of the interim legislative committee.[2] The court of appeals, therefore, correctly concluded that petitioner's "murky allegations * * * are linked together by speculation and conclusory allegations," and hence are "insufficient to raise a fact issue for trial on the conspiracy complaint" (Pet. App. A57).[3]

2. Finally, petitioner contends (Pet. 50-56) that his First Amendment right "to advocate a strong military defense and to work toward that end" (Pet. 50) was violated by the sanctions that were imposed on him. As the court of appeals concluded, however, "there is not an iota of substantiation for his allegation that he was fired in retaliation for utterances protected by the First Amendment" (Pet.

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[2] Even if such a contact could form the basis for a conspiracy charge, it would be protected by legislative immunity. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951).

[3] Despite his allegations (Pet. 32-37) that certain conversations between Jones and Cummings violated his constitutional rights, petitioner nowhere explains the way in which his rights were affected by these conversations or his rationale for asserting that the conversations were outside the scope of the immunity described in *Scheuer* v. *Rhodes*, *supra*, and *Tenney* v. *Brandhove*, *supra*. Petitioner's further argument (Pet. 38-43) that certain defamatory remarks unconstitutionally infringed a property interest protected by the Fifth and Fourteenth Amendments is without merit. By petitioner's own admission (Pet. 41), the alleged defamatory remarks occurred after his reinstatement and therefore could not possibly have affected his salary or employment.

App. A56). Petitioner cannot invoke the First Amendment to insulate his alleged mismanagement of recruitment funds.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

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[4] Petitioner also takes exception (Pet. 44-49) to the statement of the court of appeals that "the Civil Rights Acts on which this suit was predicated do not make the federal district court a forum for the litigation of every controversy surrounding the loss of property interests through state action. * * * There is no reason and no room for involvement on the part of a federal court" (Pet. App. A57-A58). Contrary to petitioner's assertion (Pet. 45), however, the court did not pronounce a rule barring legitimate claims for relief under the civil rights statutes; it merely observed that petitioner's tort claims for defamation could more appropriately be presented in state court.

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